72-1563

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1563

JORDAN C. WAITE, ET AL,

Petitioners

VERSUS

F. P. PLAZA, INC., ET AL,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF GEORGIA

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The petitioners Jordan C. Waite, et al.,[1] respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Georgia in this case.

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1. Petitioners consist of Jordan C. Waite, Nancy F. Waite, Dean B. Going, Robin Gray, Alan Burnham, Commodore C. Going, Jr., Eugene C. Cotton and Lorraine H. Cotton, and all other residents and property owners of DeKalb County, Georgia, similarly situated.

(continued on next page)

CITATIONS AND OPINIONS BELOW

The opinion of the Supreme Court of the State of Georgia printed in Appendix B hereto, infra, is reported in 230 Ga. 161. The opinion of the State trial court is unreported and is printed in Appendix B hereto, infra. The denial of rehearing by the Supreme Court of the State of Georgia printed in Appendix B hereto, infra, is reported in 230 Ga. at 165.

JURISDICTION

The judgment of the Supreme Court of the State of Georgia was entered on February 8, 1973 (Appendix B, infra). A timely petition for rehearing was denied on February 22, 1973 (Appendix B, infra), and this petition for certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U.S.C., §1257 (3). The final judgment of the lower Court to be reviewed is rendered by the highest State court of decision and rests upon a substantial Federal question raised by petitioners at the earliest opportunity and framed in the trial court and on appeal in full conformity with Georgia state practice and procedure.

Respondents consist of Goodwyn (Shag) Cages, Charlie Brown and Milton Farris (Members of the Fulton County Board of Commissioners of Roads and Revenues), Earl Garner (Director of Inspections and Licenses Department of Fulton County), F. P. Plaza, Inc. and Asa G. Candler, V, and Robert S. Griffith, Jr., d/b/a Candler-Griffith Co.

QUESTIONS PRESENTED

1. Whether the State of Georgia zoning enabling statutes and the Fulton County, Georgia zoning resolutions enacted thereunder which provide for notice of zoning hearings to property owners within the county, but provide no notice to residents or property owners residing outside the county but immediately adjacent to the property to be rezoned are per se and in application in violation of the due process and equal protection provisions of Article XIV, Section 1 of the United States Constitution.

2. Whether the State of Georgia zoning enabling statutes and the Fulton County, Georgia zoning resolutions enacted thereunder which provide for notice of zoning hearings solely by publication in the county newspaper in which sheriff's advertisements are published, and make no provision for personal notice to directly affected parties whose names and addresses are known or easily ascertainable are per se and in application in violation of the due process and equal protection provisions of Article XIV, Section 1 of the United States Constitution.

3. Whether the Fulton County Zoning Resolution which provides for notice of preliminary zoning hearing by mail to property owners within three hundred (300) feet of subject property, with the notice being mailed only to property owners listed on the tax records in Fulton County is per se and in application to property to be rezoned that abutts the county line, so arbitrary, unreasonable and discriminatory as to be unenforceable in violation of the due process and equal protection provisions of Article XIV, Section 1 of the United States Constitution.

4. Whether the State of Georgia statutes establishing zoning procedures in Fulton County (Georgia Laws, 1939, p. 584; Georgia Laws, 1952, p. 2689, and Georgia Laws, 1968, p. 3769) which require publication of notice with respect to an application to rezone property in Fulton County in the county newspaper in which sheriff's advertisements are published is violative of the due process and equal protection provisions of Article XIV, Section 1 of the United States Constitution insofar as it relates to Fulton County property which is immediately adjacent to the DeKalb County line in that it deprives DeKalb County residents and owners of property in close proximity to the Fulton County property sought to be zoned of an opportunity to appear and be heard and of notice similar to that which is given to residents and property owners in Fulton County.

5. Whether the private and informal actions of the county Board of Commissioners in changing their vote and taking new action after public hearing and final zoning action without the pre-requisite of new notice and hearing deprives affected property owners and residents of due process and equal protection in violation of Article XIV, Section 1 of the United States Constitution.

6. Whether the State of Georgia zoning statutes relative to Fulton County (Georgia Laws, 1939, p. 584; Georgia Laws, 1952, p. 2689, and Georgia Laws, 1968, p. 3769) and the Fulton County zoning resolutions adopted pursuant thereto are violative of Article XIV, Section 1 of the United States Constitution in that they provide for notice of applications for rezoning to property owners but do not provide for notice to residents similarly situated who are not property owners.

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States of America, Article XIV, Section 1 U.S.C.A. Const. Amend. 14:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Constitution of the State of Georgia, Article I, Section I. Paragraph III (Ga. Code Ann. §2-103):

> No person shall be deprived of life, liberty, or property except by due process of law.

STATUTES AND ORDINANCES INVOLVED

Georgia Laws 1939, Page 584, Appendix A, infra.

Georgia Laws 1952, Page 2689, Appendix A, infra.

Georgia Laws 1968, Page 3769, Appendix A, infra.

State of Georgia, Fulton County Comprehensive Zoning Resolutions:

Article XXVIII, Sections 3 and 4 of the Fulton County Comprehensive Zoning Resolution read as follows:

ARTICLE XXVIII

CHANGES AND AMENDMENTS

SECTION 3. Report by Atlanta-Fulton County Joint Planning Board:

1. No amendment shall be made or become effective until the same shall have been proposed by or be first submitted for approval, disapproval or suggestions of the Atlanta-Fulton County Joint Planning Board shall transmit its report upon the proposed amendment within thirty (30) days after referral to it, or the Commissioners of Roads and Revenues may proceed to adopt or reject such amendment without further awaiting the receipt of the report of the Board.

2. The Board shall hold preliminary public hearings on proposed changes, notice of which shall be given no less than two (2) weeks prior to such hearing by posting in a conspicuous place on the property for which a zoning change is under consideration, a sign not less than six (6) square feet which shall contain information as to any proposed change in classification and date of said preliminary hearing. The Board shall also give similar notice by regular mail to all property owners within three hundred (300) feet of the subject property. Said notice shall be mailed to

property owners as ownership and address appear on the tax records of Fulton County.

SECTION 4. Public Hearing: Before finally adopting any amendment or change to the District Maps or text of the Resolution the Commissioners of Roads and Revenues shall hold a public hearing thereon at the first regular meeting following the hearing by the Planning Board, notice of which shall be given once a week for three weeks in the newspaper in which the sheriff's advertisements are published, provided, however, notice of the meeting to be held by the Atlanta-Fulton County Joint Planning Board may be given simultaneously and both notices may be run during the same period.

STATEMENT OF THE CASE

Petitioners are residents and property owners residing in single-family residents in DeKalb County, Georgia, immediately adjacent to the easterly boundary line of Fulton County and immediately adjacent to the Fulton County property which was the subject of two related rezoning applications filed in Fulton County by the respondents. Petitioners file this class action challenging the constitutionality of certain Georgia statutes and Fulton County zoning resolutions relating to zoning procedures in Fulton County, Georgia.

The State of Georgia zoning enabling statutes drawn in question, Ga. Laws 1939, p. 584; Ga. Laws 1952, p. 2689; Ga. Laws 1968,

p. 3769 (Appendix A, infra) provide that the local county governing authority, in this case the Fulton County Board of Commissioners, shall proceed to hold public hearing on rezoning applications after notice to all interested parties and specify only that notice shall be by publication once a week for at least three (3) weeks in the official county newspaper. Article XXVIII, Sections 3 and 4 of the Fulton County Zoning Resolutions provides for notice of preliminary public hearing of the Planning Commission by posting a sign on the property itself and by mail to all property owners within three hundred (300) feet of the subject property, but that said notice by mail shall be given only to property owners as appear on the tax records of Fulton County. Article XXVIII, Section 4 of the Fulton County Zoning Resolutions provides for notices of the public hearing before the County Board of Commissioners by publication in the newspaper in which sheriff's advertisements are published in Fulton County.

It is undisputed in this case that the only notice of any public hearing pertaining to the zoning of the Fulton County property in this case other than the posting of a sign on the vacant property was by publication in the Fulton County newspaper in which sheriff's advertisements are published in October of 1971, and by letters of October 1971 and April 1972 mailed by the Fulton County zoning administrator to only those property owners in Fulton County within three hundred (300) feet of the property sought to be rezoned. Whereupon after public hearing final action of the Fulton County Board of Commissioners was taken on May 3, 1972, zoning the subject Fulton County property from residential to office-institutional and townhouse-residential.

Thereafter, the Fulton County Board of Commissioners attempted to change their vote by private informal action rezoning the entire property to office-institutional, and at the next monthly public hearing of the Fulton County Commissioners on June 7, 1972, attempted to rescind all prior final action taken on May 3, 1972, and rezone said property in conformity with their subsequent informal vote and private action, notwithstanding that the June 7, 1972, meeting and public hearing of the Board of Commissioners was without the pre-requisite of new zoning application and notice to petitioners of said hearing.

Petitioners by assertion in their complaint attacked at first opportunity the foregoing State of Georgia zoning enabling acts and Fulton County Comprehensive Zoning Resolution provisions that denied the petitioners "due process" and "equal protection" of the law in providing notice to Fulton County property owners by legal publication and by mailing, but requiring no notice by either publication or mail to any residents or property owners in petitioners class across the county line and immediately adjacent to and directly affected by the property which was the subject of the rezoning actions. [R. 1-18, 26-43][2] The trial court rendered its finding of fact and judgment that petitioners had been denied due process and equal protection of the law; that the zoning action by the Fulton County Board of Commissioners complained of was illegal and void; and that in particular Article XXVIII, Sections 3 and 4 of the Fulton County

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2. Reference is to unprinted certified transcript of the record numbered pages.

Zoning Resolution requirements of notice were invalid, per se, as well as in application to petitioners in violation of the Georgia and the United States Constitutions. U.S.C.A. Const. Amend. 14. Constitution of the State of Georgia, Article I, Section I, Paragraph III, (Ga. Code §2-103). [R. 67-71] (Appendix B, infra.) Respondents appealed the trial court judgment to the Supreme Court of Georgia being the highest court of the State in which a decision could be had. The Supreme Court of Georgia thereupon accepted and ruled upon the properly presented Federal question framed in the trial court. (Appendix B, infra.) The Supreme Court of Georgia held that the defective notice provision of the Fulton County Zoning Resolution Article XXVIII, Sections 3 and 4, did not violate due process or equal protection of the law as it pertained to notice of preliminary hearing before the County Planning Commission; and that since the State zoning enabling statutes and the Fulton County Zoning Resolution provided for notice by publication in the Fulton County legal newspaper of the hearing before the Fulton County Board of Commissioners, and that said notice by publication had been given in Fulton County, these provisions thereby satisfied the requirements of procedural due process and equal protection as to all affected parties, wherever located. The Court further held that the private and informal action taken by the Fulton County Board of Commissioners and their action and decision taken between the dates of May 3, 1972 and through June 7, 1972, were valid as once notice is given to all interested citizens and property owners, the County governing authority is given by law absolute authority with respect to rezoning of property within its jurisdiction and almost unrestricted authority with

respect to the time and manner in making its decision. (Appendix B, infra.) A timely petition for rehearing was denied by the Supreme Court of Georgia on February 22, 1973. (Appendix B, infra.)

REASONS FOR GRANTING THE WRIT

1. The decision of the Supreme Court of the State of Georgia in the instant case directly conflicts with applicable decisions of this Court which are substantially indistinguishable. It is well settled that an elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339 (1940); Mullane v. Central Hanover Tr. Co., 339 U.S. 306, 314, 70 S.Ct. 652, 657 (1950). It is an opportunity which must be granted at a meaningful time in a meaningful manner. Armstrong v. Manzo, 380 U.S. 545, 85 S.Ct. 1187 (1965).

Article XXVIII, Section 3 of the Fulton County Zoning Resolution is so arbitrary, unreasonable and discriminatory upon its face and in application to petitioners in this case as to be unenforceable because it is vague, uncertain and indefinite in that it requires notice by mailing to all property owners within three hundred (300) feet of the subject property and it further provides the inconsistent limitation that mailing shall only be to property owners as ownership appears on the tax records of Fulton County. The rationale of the Supreme Court of Georgia that said defective mailing notice provision

of the Fulton County Zoning Resolution is not a denial of due process and equal protection of the laws to petitioners as it pertains to notice of a preliminary hearing is without merit. A temporary, non-final deprivation of property is nonetheless a "deprivation" in terms of the Fourteenth Amendment. U.S.C.A. Const. Amend. 14. Fuentes, et al. v. Shevin, et al., 407 U.S. 67, 92 S.Ct. 1983 (1972). As to the sufficiency of notice by publication under the State of Georgia zoning enabling statutes, Georgia Laws 1939, Page 584; Georgia Laws 1952, Page 2689 and Georgia Laws 1968, Page 3769 (Appendix A, infra), and Article XXVIII, Sections 3 and 4 of the Fulton County Zoning Resolution, this Court has recognized the inadequacies of such notice in words that bear repeating here:

> "Chance alone brings to the attention of even a local resident an advertisement in small type inserted in the back pages of a newspaper, and if he makes his home outside the area of the newspaper's normal circulation the odds that the information will never reach him are large indeed. The chance of actual notice is further reduced when as here the notice required does not even name those whose attention it is supposed to attract, and does not inform acquaintances who might call it to attention." Mullane v. Central Hanover Bank & Tr. Co., et al., at 315, 70 S.Ct., at 658.

The general rule that emerges from the decisions of this Court is that notice by publication is not enough with respect to a

person affected by the proceedings in question when his name and address are known or easily ascertainable. This rule has consistently been applied in holding that notice by publication only in an official local newspaper is constitutionally insufficient where the names and the post office addresses of those affected by a proceeding are at hand. New York v. New York, N. H. & H. R. Co., 344 U.S. 293, 296, 73 S.Ct., 299, 301 (1953); Walker v. Hutchinson City, 352 U.S. 112, 77 S.Ct., 200 (1956). The rule was again applied in Schroeder v. City of New York, 371 U.S. 208, 83 S.Ct., 279 (1962), in a factual situation much akin to the present case. In Schroeder, publication of notice of condemnation in two (2) county newspapers, published in communities miles away from the property of petitioners affected and posting of notice on trees and poles in general vicinity of property did not constitute notice required by due process, especially where property owner's name and address were readily ascertainable from both deed records and tax rolls.

Decision in the instant case is clearly controlled by the well settled rule stated in the decisions of this Court, and by the specifically relevant application of that rule in the Schroeder case. The decision of the Court below is shockingly wrong and presents substantial due process questions for review by this Court to prevent the sustaining of direct injury to petitioners as a result of the enforcement of the decision of the Supreme Court of the State of Georgia.

2. Clearly, the question presented is of importance in preserving for citizens, property owners and residents in municipal, county and local neighborhoods their right to notice of public hearing in decisions of

local governmental authorities as guaranteed by the United States Constitution. U.S.C.A. Const. Amend. 14. It is common as in this case as a matter of convenience for States to provide authority for zoning and rezoning to counties for property within their jurisdiction. However, even if the general validity of zoning regulations as in legitimate exercise of State power is beyond question, the decisions of this Court further establish that they may be held constitutionally invalid as applied, as in this case, when they operate to deprive petitioners as individuals of a protected right. Boddie v. Connecticut, 401 U.S. 377, 91 S.Ct. 780 (1971). Constitutional imperatives of the Equal Protection Clause must have priority over the comfortable convenience of a status quo. U.S.C.A. Const. Amend. 14. Williams v. Illinois, 399 U.S. 235, 90 S.Ct., 2018 (1970).

Thus, while a county line may be a factor in determining the appropriate form of the requisite notice and hearing of zoning procedures, it is not decisive of the basic right to prior notice and hearing of some kind. Far too frequently, the property owners or residents across the county line, but immediately and directly affected by the zoning actions, as petitioners in this case, are deprived at least in application of constitutionally valid notice as a matter of right, rather than as a matter of grace, under the guise of county boundaries. The Fourteenth Amendment draws no bright lines around municipal, city or county boundaries where deprivation of property is concerned.

Review of the substantial Federal question in this case by this Court is in the public interest, since it is likely to exist if not to be presented in many county

government provisions of notice based upon and provided to property owners within the county only that are constitutionally invalid, per se, and in application to interested and directly affected parties residing immediately across county lines.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

Ferdinand Buckley

Raymond H. Vizethann, Jr.

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225 Peachtree Street, N.E.
Atlanta, Georgia 30303

COUNSEL FOR PETITIONERS

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of May, 1973, three copies of the petition for Writ of Certiorari were mailed, postage prepaid, to each party separately represented in the proceeding and required to be served pursuant to Rule 33 (1) and (3), Rules of the Supreme Court of the United States.

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CONSTITUTION

AMENDMENT XIV.—CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

2-103. (6359) **Paragraph III. Life, liberty, and property.**—No person shall be deprived of life, liberty, or property, except by due process of law.

Cross-references.—Property rights of corporators, see § 22-705. Due process clauses of Federal Constitution, see §§ 1-805, 1-815.

See notes to §§ 1-805, 1-815, 2-125, 2-301, 2-5403; also 171/25 (154 S. E. 436).

Cited. 175/826, 831 (166 S. E. 200); 175/779, 784 (166 S. E. 227); 182/338, 339 (185 S. E. 330); 182/333, 334 (185 S. E. 522); 182/523 (186 S. E. 561); 184/187 (190 S. E. 592); 184/860 (1) (193 S. E. 769); 186/77, 78 (196 S. E. 769).

Applied. 186/446, 453 (197 S. E. 846).

Accusation: Whether it is necessary that affidavit should support accusation in city court, it is no ground of complaint where defendant is tried under accusation supported by affidavit that law creating city court makes no provision therefor; affidavit attested by clerk of city court, sufficient. 120/670 (4, 5) (48 S. E. 170).

Trial of one charged with violation of municipal ordinance without furnishing him with formal accusation or written statement of charge against him, constitutional. 124/701 (3) (52 S. E. 751); and see 7 App. 190 (1) (66 S. E. 489), 397 (1) (66 S. E. 1036); 10 App. 818 (1) (74 S. E. 286).

Failure to furnish person charged with violating city ordinance with written statement of charge did not deprive him of fair trial, with due process of law. 15 App. 511 (1) (83 S. E. 866).

Defendant charged with violating city ordinance need not be furnished with written statement of charge unless charter otherwise provides. Id.

Where petition for certiorari fails to set forth municipal ordinance requiring that accused be furnished with specific accusation and list of witnesses, refusal by municipal court of continuance because of refusal to inform accused as to specific charge and to furnish him list of witnesses is not ground for reversal. 17 App. 737 (1) (88 S. E. 416).

Where charter of municipality does not expressly so provide, it cannot be said that petty offender, charged with violating ordinance, was not accorded fair trial, with due process of law, because of failure to prefer written accusation specifically defining offense with which he was charged. 18 App. 33 (1) (88 S. E. 744).

Amusement places, dance halls, tourist camps, etc.: Acts 1937, p. 624, regulating establishment, etc., of public dance halls, amusement places, tourist camps, etc., outside limits of towns or cities having population of 3,000 or more, is not violative of this section. 193/565 (1) (19 S. E. 2d 493).

Arrest of one for violation of municipal ordinance and his detention, without warrant, to await trial before the mayor, on the next day, not illegal. 46/80 (1).

Assessments: Act providing for assessments for municipal improvements, unconstitutional, where not providing for fixing amount thereof with reference to cost or benefit to property owners, or for apportionment of cost, or for notice to property owners, or for giving them any hearing. 115/454 (41 S. E. 661).

Act authorizing collection of assessments for street improvements, after notice to owners, with right to contest validity and amount by judicial proceeding, not unconstitutional on ground that it deprives citizen of property without due process of law, though it requires that, as condition to legal proceeding, owner shall deposit amount admitted to be due. 136/398 (2, 3) (71 S. E. 770); see 85/49 (3) (11 S. E. 802).

Acts 1912, p. 574, § 15, amending charter of city of Atlanta, allowing sale of segment of street railway for street improvement, is not unconstitutional as lacking due process of law. 144/722, 723 (5) (87 S. E. 1058).

Assessment increasing valuation returned by property owner, without notice of hearing, was without due process of law, where remedy by arbitration proved abortive because arbitrators, though agreeing that assessment

APPENDIX A

ARTICLE XXVIII

CHANGES AND AMENDMENTS

SECTION 1. Requirements for Change: Whenever the public necessity, convenience, general welfare or good zoning practice justify such action, and after consideration by the Atlanta-Fulton County Joint Planning Board, the Commissioners of Roads and Revenues may, by resolution, change the regulations set forth in this Resolution and may change the zoning districts as established on the District Maps.

SECTION 2. Application for or Initiation of a Change: A proposed change of district or of text may be initiated by the Atlanta-Fulton County Joint Planning Board, the Commissioners of Roads and Revenues, or by an application filed with the Atlanta-Fulton County Joint Planning Board, by one or more owners of property within the area proposed to be changed; provided, however, that property owner shall not initiate action for a zoning amendment affecting the same parcel more often than once every twelve (12) months. Any communication purporting to be an application shall be regarded as mere notice to seek relief until it is made in the form required. Upon receipt of any such communication the interested parties shall be supplied with the proper form for present application.

SECTION 3. Report by Atlanta-Fulton County Joint Planning Board:

1. No amendment shall be made or become effective until the same shall have been proposed by or be first submitted for approval, disapproval or suggestions of the Atlanta-Fulton County Joint Planning Board. Such Board shall transmit its report upon the proposed amendment within thirty (30) days after referral to it, or the Commissioners of Roads and Revenues may proceed to adopt or reject such amendment without further awaiting the receipt of the report of the Board.

2. The Board shall hold preliminary public hearings on proposed changes, notice of which shall be given no less than two (2) weeks prior to such hearing by posting in a conspicuous place on the property for which a zoning change is under consideration, a sign not less than six (6) square feet which shall contain information as to any proposed change in classification and date of said preliminary hearing. The Board shall also give similar notice by regular mail to all property owners within three hundred (300) feet of the subject property. Said notice shall be mailed to property owners as ownership and address appear on the tax records of Fulton County.

SECTION 4. Public Hearing: Before finally adopting any amendment or change to the District Maps or text of the Resolution the Commissioners of Roads and Revenues shall hold a public hearing thereon at the first regular meeting following the hearing by the Planning Board, notice of which shall be given once a week for three weeks in the newspaper in which the sheriff's advertisements are published; provided, however, notice of the meeting to be held by the Atlanta-Fulton County Joint Planning Board may be given simultaneously and both notices may be run during the same period.

orn to and subscribed before me,
is 29th day of January, 1968.

/ Pamela A. McIntyre
Notary Public, Georgia, State at Large.
My Commission expires Jan. 9, 1971.
(Seal).

Approved April 12, 1968.

ACT CREATING ZONING AND PLANNING COMMISSIONS IN CERTAIN COUNTIES AMENDED (300,000 OR MORE).

No. 1263 (House Bill No. 1142).

An Act to amend an Act entitled "Zoning in Certain Counties" for the creation and establishment for counties having a population of 300,000 or more inhabitants, a county planning commission and a board of zoning appeals, and to authorize the board of commissioners of roads and revenues to exercise the authority conferred upon them by law with reference to zoning property in said county . . . and for other purposes" approved February 15, 1952 (Ga. L. 1952, p. 2689 et seq.) so as to provide that the hearing before the county authorities with respect to the modification or amendment of any portion of the comprehensive plan or zoning resolution shall be after a written report has been filed by the planning commision of the county, which report of such planning commission shall be within thirty (30) days after the public hearing held by such commission . . . and for other purposes.

Section 1. Be it enacted by the General Assembly of Georgia, and it is hereby enacted by the authority of the same, that An Act entitled "An Act to create and establish for counties having a population of 300,000 or more inhabitants by the last or any future census of the United States a county planning commission and board of zoning appeals and to authorize the board of commissioners of roads and

revenues or other governing authorities for such counties to create a county planning commission; to authorize said county planning commission to exercise the authority conferred upon them by law with reference to zoning property in said county; . . . and for other purposes" be amended by striking section 9 in its entirety and inserting in lieu thereof a new section 9 as follows:

"Section 9. After the adoption of said comprehensive plan or zoning resolution herein provided for, the same may be modified, amended, and designated areas therein changed, and the rules governing the erection and construction of buildings modified and changed in the following manner: All proposals to amend or modify any portion of the comprehensive plan or zoning resolution, whether proposed by the authorities in charge of county affairs, by the planning commission, by a property owner, or otherwise, shall be filed with the planning commission which shall proceed to hold a public hearing thereon after notice to interested parties, in accordance with the rules and regulations adopted by the authorities in charge of county affairs as a part of the zoning resolution. The commission shall make a written report to the authorities in charge of county affairs within 30 days after such hearing, which report shall contain the the recommendations of the commission as to whether or not the proposal to amend or modify the comprehensive plan or zoning resolution should be adopted. At the first regular meeting of the county commission after such report is received, the commissioners of roads and revenues or other governing authorities of such counties shall hold public hearing on said proposed change. Notice thereof shall be published once a week for at least three (3) weeks in the newspaper in which sheriff's advertisements are published prior to the holding of the same, such notice to state the nature of the proposed change and the date, hour and place of the meeting, which notice, however, may be published during the period when the planning commission has said matter under consideration, and before a recommendation has been made thereon. On the day and hour appointed for the public hearing the county authorities shall proceed to a hearing on the proposed change, provided they shall have the right to continue the hearing from day to day, or to a

named day, or may withhold final action thereon pending further consideration and investigation on their part, Provided, the county commission shall take no action until it has received the recommendation of the planning commission.

Section 2. Be it further enacted that all laws and parts of laws in conflict with this Act are hereby repealed.

Approved April 12, 1968.

DOUGHERTY COUNTY—COMPENSATION OF ORDINARY.

No. 1264 (House Bill No. 1654).

An Act to amend an Act placing the sheriff, the clerk of the superior court, and the ordinary of Dougherty County upon an annual salary, approved March 7, 1955 (Ga. L. 1955, p. 2874), as amended, so as to change the compensation of the ordinary of Dougherty County; to provide an effective date; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia:

Section 1. An Act placing the sheriff, the clerk of the superior court, and the ordinary of Dougherty County upon an annual salary, approved March 7, 1955 (Ga. L. 1955, p. 2874), as amended, is hereby amended by striking from section 2 the following:

"The salary of the ordinary of Dougherty County shall be seven thousand five hundred dollars ($7,500.00) per annum,"

and substituting in lieu thereof the following:

"The salary of the ordinary of Dougherty County shall be seven thousand five hundred dollars ($7,500.00) per

ZONING IN CERTAIN COUNTIES.

No. 825 (Senate Bill No. 268).

An Act to create and establish for counties having a population of 300,000 or more inhabitants by the last or any future census of the United States a county planning commission and board of zoning appeals and to authorize the board of commissioners of roads and revenues or other governing authorities for such counties to create a county planning commission; to authorize said county planning commission to exercise the authority conferred upon them by law with reference to zoning property in said county; to provide that said planning commission may recommend to the board of commissioners of roads and revenues or other governing authorities of such counties a comprehensive plan of zoning; to provide that said board of commissioners of roads and revenues or other governing authorities may adopt a comprehensive zoning plan; said county authorities may provide a method and manner of carrying out the terms of said Act; to provide that said county authorities may pass rules and regulations governing the zoning of property in such counties; to provide a method of electing the personnel to the county planning commission and to the board of zoning appeals; to provide authority for said board of commissioners of roads and revenues or other governing authorities for such counties to appropriate funds to provide for the personnel in carrying out the terms of this Act; to provide that said planning commission may administer the present law now in force until such time as the comprehensive plan for zoning is adopted; to provide that upon the adoption of said comprehensive plan this Act is to take effect; and for other purposes.

Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same as follows:

Section 1. That the board of commissioners of roads

County planning commission.

and revenues or other governing authorities of counties having a population of 300,000 or more inhabitants by the last or any future census of the United States shall have the power and authority to create a county planning commission, which said commission shall consist of five (5) citizens to be appointed by said board of commissioners of roads and revenues or other governing authorities of said counties, with the chairman of said board of commissioners of roads and revenues or other governing authorities as an ex-officio member thereof and the clerk of said board of commissioners of roads and revenues or other governing authorities for such counties as an ex-officio clerk thereof.

Members.

Section 2. Said planning commission shall have all of the power hereinafter set forth, shall have such other power as may be proper and consistent with the operation of said commission, shall have such additional powers as may by resolution of said board of commissioners of roads and revenues or other governing authorities for such counties from time to time be conferred thereon not inconsistent with the terms of this Act or the laws of this State, now or hereafter existing; the power and authority granted to said planning commission and to be granted them from any other source, as well as the power granted by the board of commissioners of roads and revenues or other county authority is to be exercised only in the unincorporated area of the county (that is outside any incorporated municipal limits). An office shall be provided for said commission in the courthouse of such counties at which said commission may hold its meetings, transact its business, and keep its records. Said commission shall have the power and authority to employ consulting advisors who may be experts or well-informed persons on county and municipal planning and such other help and personnel as may be necessary and to pay for such services, including any other expenses that may be necessarily incurred, and the expense of its members in the performance of their duties under the direction of said commission; all such expenses are herein authorized to be paid out of said funds as may be appropriated to said county planning commission by the board of commission-

Powers of commission.

Office.

Expenses.

ers of roads and revenues or other governing authorities of such counties, in its discretion.

Section 3. It shall be the duty of said county planning commission, and they shall have power to recommend or make suggestions to the board of commissioners of roads and revenues or other governing authorities of such counties concerning the laying out, widening, extending, and location of streets, boulevards, roads and highways; the location of parks and playgrounds; the relief of traffic conditions, traffic congestion; the development of housing and supervision of sanitary conditions; and the establishment of zones or districts. Further, it shall be the duty of said planning commission to consider and make recommendations and suggestions to the commissioners of roads and revenues or other governing authorities of such counties in Georgia, concerning the use, height, area, and kind of buildings or structures to be erected in the various sections of said counties; to study and propose such regulations as may be advisable for the promotion of the business interest, health, morals, safety, comfort, convenience and welfare of said counties. Duties.

Section 4. Said planning commission and the governing authorities of said counties shall at all times in carrying out the power and authority herein given bear in mind the unincorporated area over which they have jurisdiction and cooperate in so far as possible with the governing authorities of the cities of such counties or other authorities in carrying out the powers that may be granted or may hereinafter be granted from any source. Said planning commission shall have authority to investigate and make recommendations to the governing authorities of said counties concerning all plans for sewers, both sanitary and storm water, wherever placed in any property, subdivision or lots developed for sale. Whenever said counties undertake the erection of any public buildings (other than school buildings), the governing authorities of said counties shall refer the plans and specifications for such buildings or public improvements to the planning commission for consideration and recommendation. Powers.

Appropriations.

Section 5. The board of commissioners of roads and revenues or other governing authorities of such counties in Georgia are authorized and directed to make such appropriations to the county planning commission for the carrying on of its work as in the judgment of such governing authorities may be deemed advisable.

Selection of members, terms, etc.

Section 6. Immediately upon approval of this Act the board of commissioners of roads and revenues or other governing authorities for such counties shall elect the members to comprise said planning commission, being five (5) in all, (together with the chairman of said board of commissioners of roads and revenues or other governing authorities as ex-officio member thereof and the clerk of said board or other governing authorities as ex-officio clerk of said commission) and in electing them they shall designate that the terms of two of said members shall expire on January 1, next thereafter, and that the terms of three of said members shall expire on January 1, 1954. As the terms of said members of said planning commission expire their successor shall be elected for a term of four years. Provided however, that immediately upon the approval of this Act the board of commissioners of roads and revenues or other governing authorities of such counties who under the present law are operating with four members may elect the additional member for a term to expire on January 1, 1954 and upon expiration of said term his successor shall be elected for a term of four (4) years.

Zoning plan.

Section 7. Said planning commission shall prepare and submit to the board of commissioners of roads and revenues or other governing authorities a comprehensive plan for zoning said counties, for the purpose of suggesting the proper location of streets, apartment houses, dwellings and other uses of property or land, the height of buildings, the area of the lot to be occupied, the provision of yard space and the fixing of building lines. It is not intended by the provision to vest in the planning commission, or for that matter in the board of commissioners of roads and revenues or other governing authorities, authority to forthwith adopt a planning or zoning

resolution. Said board of commissioners of roads and revenues or other governing authorities of such counties may however, receive from said planning commission a comprehensive plan for zoning and then proceed to adopt same as hereinafter provided.

Section 8. Upon receipt of the comprehensive plan herein mentioned from said county planning commission the board of commissioners of roads and revenues or other governing authorities of said counties of Georgia may accept or reject the report; they may adopt an entirely new plan or they may adopt the plan of the said planning commission in modified form. Before proceeding to the consideration of such an adoption, however, the county authorities shall advertise once a week for four weeks in a newspaper published in said county the fact that on a given date they will proceed with consideration of the plan offered by the planning commission, so that the public may be informed of the action contemplated by the said county authorities. On the day named in the notice they shall proceed to the adoption of said plan (in modified form if they so desire) or some other plan of their own and may continue the hearing from day to day or to any named day until they take final action on the same.

Notice, hearing to adopt plan.

Section 9. After the adoption of said comprehensive plan or zoning resolution herein provided for, the same may be modified, amended, and designated areas therein changed, and the rules governing the erection and construction of buildings modified and changed in the following manner: All proposals to amend or modify any portion of the comprehensive plan or zoning resolution, whether proposed by the authorities in charge of county affairs, by the planning commission, by a property owner, or otherwise, shall be filed with the planning commission which shall proceed to hold a public hearing thereon after notice to interested parties, in accordance with the rules and regulations adopted by the authorities in charge of county affairs as a part of the zoning resolution. Such proposal shall likewise be heard by the authorities in charge of county affairs at the next regu-

Procedure to amend adopted plan or resolution.

lar meeting thereof after notice of such hearing (day and hour) of said proposed change has been given to the public by publishing notice thereof in the newspaper in said county in which the sheriff's advertisements are published, once a week for at least three weeks; provided, however, notice of the meeting to be held before the county authorities and of the meeting to be held by the planning commission may be given simultaneously and both notices may be run during the same period. The county authorities may proceed to hear all interested parties in support of and in opposition to the proposed change but in no case shall a final decision be made thereon until the recommendation of the planning commission has been received and filed with the county authorities or considered by the county authorities in final action thereon. On the day and hour appointed for a public hearing the county authorities shall proceed to a hearing on the proposed change, provided they shall have the right to continue the hearing from day to day, or to a named day, as in their discretion they may deem advisable or may table any proposal or postpone any hearing pending receipt of the recommendation of the planning commission, or may proceed with the hearing but withhold final action thereon pending receipt of the recommendation of the planning commission.

Rules and regulations of planning commission.

Section 10. The county planning commission shall adopt such rules and regulations as they may deem advisable for the governing of their commission and adopt such rules and regulations as they may deem advisable for the public to appear before said planning commission and be heard as to any changes, modifications or amendments to any planning to zoning resolution that may have been passed by any county authorities; and they may require a deposit of such advertising cost or other cost as they may in their discretion see fit, before they will conduct a hearing in regard to any application, in regard to any change, modification or amendment and before they will recommend the same to the commissioners of roads and revenues or other governing authorities of such counties in Georgia.

Section 11. The board of commissioners of roads and revenues or other governing authorities for such counties in Georgia may, in the interest of public health, safety, order, convenience, comfort, prosperity or the general welfare of the community, adopt by resolution a plan or plans for the districting and/or zoning of the territory and land in such counties in Georgia, (outside of incorporated areas), for the purpose of regulating location of business, trades, industries, residences, apartment houses, hotels, dwellings, outhouses, or any other use of property or land, or for the purpose of regulating the height, kind and dimensions of buildings or other structures; also they may prescribe for the same purpose the area or dimensions of the lots and yards used in connection with any building or structure to be erected and occupied for any purpose set out in this section; or they may in their discretion regulate the alignment of buildings and structures and prescribe their distances from the street along the front thereof. The zoning regulations may be based on any one or more of the purposes above described. The county may be divided into such number of zones or districts and such districts may be of such shape and area as the county authorities may deem best suited to attain the purpose of the zoning regulations. Such county authorities may go into congested areas and prescribe zoning regulations for any part or all of such congested areas and they are to be the judges of where such congested areas may be and the extent and limitations thereof. In the determination and establishment of districts and regulations, classifications may be based upon the nature or character of the trade, industry, profession or other activity conducted or to be conducted upon the premises or land, the number of persons, families or other group units to reside in or use such buildings, the public, quasi-public, or private nature of the use of the premises or land, or upon any other basis or bases relevant to the promotion of public health, safety, order, morals, convenience, prosperity or welfare of the community.

Zoning powers of county.

Section 12. For the reasons stated said county authorities shall have the right and power, in any districts

proposed to be set aside primarily for residence purposes, to further classify the use thereof and to provide therein the class or classes of residents to be housed therein and to provide therein such other similar regulations and restrictions as shall secure the peace and good order of the county and the residents thereof.

Condition precedent to adoption of zoning regulations.

Section 13. No resolution adopting zoning regulations as above authorized shall be passed by the commissioners of roads and revenues or other governing authorities of such counties in Georgia until after a comprehensive plan for the zoning of the county has been prepared and submitted to the commissioners of roads and revenues or other governing authorities of such counties in Georgia by the county planning commission; and the same may be adopted modified or repealed, provided notice is given thereof in the same manner as provided for modifications and changes as in this Act set out.

Administration of zoning regulations.

Section 14. The zoning regulations here authorized and adopted by said county authorities shall be administered by the inspector of buildings and/or some other designated official under the rules and regulations of the board of zoning appeals.

Board of zoning appeals.

Section 15. The board of commissioners of roads and revenues or other governing authorities of such counties in Georgia are authorized to create a board of zoning appeals which said board shall hear and decide appeals from, and review any order, requirement, or determination made by, the inspector of buildings in the enforcement of zoning regulations or made by any other official of the county to whom the enforcement of these regulations may be delegated. The board of zoning appeals in its administration of said regulations may permit an exception to the regulations herein provided for and shall lay down rules and regulations for hearings on petitions for such exceptions to the said regulations, and grant or reject the same as in their judgment may seem best.

Section 16. The board of zoning appeals here au-

thorized shall consist of any number of citizens (not exceeding) five (5) appointed by the board of commissioners of roads and revenues or other governing authorities of such counties in Georgia in the same manner and at the same time as the planning commission may be appointed. Said commissioners of roads and revenues or other governing authorities of such counties in Georgia if they see fit may declare that the planning commission may exercise all the functions of the board of zoning appeals and if they so determine such board of zoning appeals will be the same as the planning commission until such time as the board of commissioners of roads and revenues or other governing authorities of such counties in Georgia may see fit to change the same and appoint a separate personnel for said purpose.

Members.

Planning commission may act board of appeals.

Section 17. Every decision of the board of zoning appeals, or the board of adjustment, in the administration of the authority hereinabove set out and in the administration of the zoning regulations of said counties shall be subject to review by the superior court of such county as provided in the Act providing for zoning by municipal authorities (Ga. L. 1946, pp. 191, 194).

Review by superior court.

Section 18. Be it further enacted by the authority aforesaid that any property in such counties heretofore zoned by any proper authority heretofore existing shall not be changed or upset by reason of the authority here given for the zoning or planning; but all said property shall remain zoned as if this Act had not been passed until such time as the proper county authorities, may, in their discretion re-zone said property, and when so rezoned for said purpose it shall be done under the authority and in the manner here prescribed.

Property already zoned.

Section 19. Be it further enacted that any person, firm or corporation violating any of the provisions of this Act or any restrictions imposed by authority of this Act, or violating any regulations of any county authority made in pursuance of this Act, shall be guilty of a misdemeanor, and upon conviction, shall be subject to fine

Violations.

or imprisonment or both, as provided by law, in misdemeanor cases.

Nuisances.

Section 20. Be it further enacted by the authority aforesaid that any violation of the terms of this Act by any person, firm or corporation or a violation by such parties of the rules and regulations prescribed by the county authorities in pursuance with this Act shall be termed a nuisance and a continuing nuisance so long as such violation may be continued and such violation may be subject to abatement as a nuisance as provided by the laws of this State.

Enforcement of Act.

Section 21. Be it further enacted by the authority aforesaid that the authority herein given to the county authorities under the terms and conditions of this Act may be enforced by the county, or proper county authority, by injunction or otherwise. This authority is cumulative and is not to be construed as curtailing the right of any person, firm or corporation, resident, property owner or other persons, of bringing any proper action for the enforcement of this Act or of such rules and regulations as may be promulgated by county authorities in pursuance of this Act.

Existing zoning laws.

Section 22. Be it further enacted by the authority aforesaid that until the adoption of a comprehensive zoning plan by the board of commissioners of roads and revenues or other governing authorities of such counties in Georgia which is provided for in this Act, that the present laws of force and effect in said counties concerning zoning shall remain of force and effect; it being contemplated by this Act that the present zoning laws for such counties are to remain in force and effect until the time herein set out; namely: upon adoption by said board of commissioners of roads and revenues or other governing authorities of such counties in Georgia of a comprehensive zoning plan as provided for in this Act; and that in the meantime said present law is in no wise

Pending applications, etc.

amended, modified or repealed except in the following manner: it is hereby specifically provided that immediately upon the approval of this Act the board of commis-

sioners of roads and revenues or other governing authorities of such counties in Georgia may elect and set up and organize the county planning commission provided for in this Act, and that said county planning commission shall immediately take over the duty of receiving applications, conducting hearings and administer the present zoning regulations under such rules and regulations consistent therewith as may be prescribed by said board of commissioners of roads and revenues or other governing authorities of such counties in Georgia; such petitions for zoning as may be pending before the board of commissioners of roads and revenues or other governing authorities of such counties in Georgia may be transferred by such board of commissioners of roads and revenues or other governing authorities of such counties in Georgia to the county planning commission with a definite date fixed for their hearing so that those interested may be notified. On the day and hour named by the board of commissioners of roads and revenues or other governing authorities of such counties in Georgia for the hearing of such pending petitions the county planning commission may proceed to hear them or if in their judgment it so desires postpone them until a definite time for such hearing. The county planning commission in administering the present law will keep minutes or records and return a record of its findings to the board of commissioners of roads and revenues or other governing authorities of such counties in Georgia so that the same may be spread upon the minutes of such board of governing authorities.

Compensation of members, commission and board.

Section 23. Be it further enacted by the authority aforesaid that the members of the planning commission and of the board of zoning appeals provided herein shall receive a compensation of ten dollars ($10.00) per day for each day on which such members shall attend a meeting of the planning commission or board of zoning appeals for the purpose of transacting business, said compensation to be paid out of county funds.

Section 24. Be it further enacted that if any part, parts or sections of this Act should for any reason be

declared unconstitutional, such decision shall not affect the validity of any remaining portion of this Act, which remaining portion shall remain of force as if such Act had been passed with the unconstitutional portion thereof eliminated, and it is hereby declared the intention of the General Assembly that it would have adopted the remaining portion of this Act without including therein any such part, parts of section which may for any reason be hereafter declared unconstitutional.

Rules and regulations, force of.

Section 25. The rules and regulations adopted by the planning commission herein authorized, or the governing authorities of such counties in Georgia shall have the force and effect of law; and said planning commission and said governing authorities of such counties in Georgia being hereby clothed with all of the authority which the General Assembly can grant to such authorities and such planning commission under the laws of the State of Georgia.

If municipal planning board.

Section 26. Should the largest municipality lying wholly or in part in any such county form a municipal planning board and board of adjustment as authorized by an Act approved January 31, 1946 (Ga. L. 1946, p. 191), entitled, "An Act to authorize the governing authority of the several municipalities of this State to enact zoning and planning ordinances and regulations, to provide the procedure for zoning and planning, to provide for the establishment of planning boards and boards of adjustment and for other purposes." as amended, said municipal planning board and board of adjustment shall, respectively, have all of the powers, authority and duties of the county planning commission and county board of zoning appeals provided by this Act or any amendment thereto, and no county planning commission or county board of zoning appeals shall be created or appointed.

Section 27. This Act is to take effect upon the date of its approval.

Section 28. Be it further enacted that all laws and

parts of laws in conflict with this Act are hereby repealed.

Approved February 15, 1952.

CITY COURT OF CHATTOOGA COUNTY.

No. 827 (Senate Bill No. 375).

An Act to repeal an Act approved January 31, 1951 (Ga. L. 1951, p. 2040), which Act amended an Act establishing the City Court of Chattooga County by changing the method of selecting the solicitor of said court; to repeal conflicting laws; and for other purposes.

Be it enacted by the General Assembly of Georgia as follows:

Act of 1951 repealed.

Section 1. The Act approved January 31, 1951 (Ga. L. 1951, p. 2040), which Act amended an Act establishing the City Court of Chattooga County by changing the method of selecting the solicitor of said court, is hereby repealed in its entirety.

Section 2. All laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 15, 1952.

Affidavit of publication attached to enrolled copy.

CHATTOOGA COUNTY—ORDINARY'S COMPENSATION.

No. 833 (Senate Bill No. 377).

An Act to give the Ordinary of Chattooga County compensation in addition to the fees which he now re-

fi. fa. shall claim that the amount thereof, or some part of same is not owing, or that the same is proceeding illegally, he may file illegality thereto, and the procedure thereon, in this event shall be the same as provided for illegalities in case of tax fi. fas.

Service or maintenance charge.

Section 13. The county authorities aforesaid shall have authority to charge a reasonable sum for the maintenance of said sewer after the same is laid in addition to the cost of construction and this authority can be exercised by charging a flat rate for each service connection to be provided for by regulation taking into consideration the kind of building to be served or an annual maintenance charge may be made by said county authorities as in their judgment seems best. The county authorities will provide by regulation the method and manner of collecting for such maintenance service and for the issuance of fi. fas. for the collection thereof if necessary.

Approved March 4, 1939.

FULTON PLANNING COMMISSION CREATED.

No. 65.

An Act to create and establish for Fulton County, a County Planning Commission and Board of Zoning Appeals, and to authorize the Board of Commissioners of Roads and Revenues for Fulton County to create a County Planning Commission; to authorize said County Planning Commission to exercise the authority conferred upon them by law with reference to zoning property in said county; to provide that said planning commission may recommend to the Board of Commissioners a comprehensive plan of zoning; to provide that said Board of Commissioners may adopt the comprehensive zoning plan; said county authorities may

APPENDIX A

provide a method and manner of carrying out the terms of this Act; to provide that said county authorities may pass rules and regulations governing the zoning of property in Fulton County; to provide a method of electing the personnel to the County Planning Commission and to the Board of Zoning Appeals; to provide authority for said Board of Commissioners of Roads and Revenues for Fulton County to appropriate funds to provide for the personnel in carrying out the terms of this Act; to provide that said planning commission may administer the present law now in force until such time as such comprehensive plan for zoning is adopted; to provide that upon the adoption of said comprehensive plan this Act is to take effect; and for other purposes.

Be it enacted by the General Assembly of Georgia, and it is hereby enacted by authority of the same as follows:

Section 1. That the Board of Commissioners of Roads and Revenues or other governing authority, of Fulton County, Georgia, shall have the power and authority to create a County Planning Commission, which said commission shall consist of four (4) citizens to be appointed by said Board of Commissioners of Roads and Revenues of said county or other county authority, with the chairman of said Board of Commissioners of Roads and Revenues as an ex-officio member thereof and the Clerk of said Board of Commissioners of Roads and Revenues for Fulton County as an ex-officio clerk thereof.

Organization of planning commission.

Section 2. Said County Planning Commission shall have all the powers hereinafter set forth, shall have such other powers as may be proper and consistent with the operation of said commission, shall have such additional powers as may by resolution of said Board of Commissioners of Roads and Revenues for Fulton County from time to time be conferred thereon not inconsistent with the terms of this Act or the laws of this State, now or

Powers.

hereafter existing; the power and authority granted to said Planning Commission and to be granted them from any other source, as well as the power granted by the Board of Commissioners of Roads and Revenues, or any other county authority, is to be exercised only in the unincorporated areas of the county (that is outside any incorporated municipal limits). An office shall be provided for said Commission in the Court House of said county at which said Commission may hold its meetings, transact its business and keep its records. Said Commission shall have the power and authority to employ consulting advisors who may be experts or well-informed persons on county and municipal planning and such other help and personnel as may be necessary and to pay for such services, including any other expenses that may be necessarily incurred, and the expense of its members in the performance of their duties under the direction of said commission; all such expenses are here authorized to be paid out of such funds as may be appropriated to said County Planning Commission by the Board of Commissioners of Roads and Revenues of Fulton County, Georgia, in its discretion.

Office in court house.

Duties.

Section 3. It shall be the duty of said County Planning Commission, and they shall have power to recommend or make suggestions to the Fulton County Commissioners or other authority concerning the laying out, widening, extending, and location of streets, boulevards, roads and highways; the location of parks and playgrounds; the relief of traffic conditions, traffic congestion; the development of housing and supervision of sanitary conditions; and the establishment of zones or districts. Further, it shall be the duty of said Planning Commission to consider and make recommendations and suggestions to the Commissioners of Roads and Revenues of Fulton County, Georgia, concerning the use, height, area, and kind of buildings or structures to be erected in the various sections of said county; to study and propose such regulations as

APPENDIX A

Fulton Planning Commission Created.

may be advisable for the promotion of the business interest, health, morals, safety, comfort, convenience and welfare of said county.

Section 4. Said Planning Commission and the governing authorities of said county shall at all times in carrying out the power and authority herein given bear in mind the unincorporated area over which they have jurisdiction and cooperate in so far as possible with the governing authorities of the City of Atlanta or other authorities in carrying out the powers that may be granted or may hereinafter be granted from any source. Said Planning Commission shall have authority to investigate and make recommendation to the governing authorities of said county concerning all plans for sewers, both sanitary and stormwater wherever placed in any property, subdivision or lots developed for sale. Whenever said county undertakes the erection of any public building (other than school buildings), the governing authorities of said county shall refer the plans and specifications for such building or buildings or public improvements to the Planning Commission for consideration and recommendation.

Cooperation with City of Atlanta.

Recommendations in regard to sewers and public buildings.

Section 5. The Board of Commissioners of Roads and Revenues for Fulton County, Georgia, are authorized and directed to make such appropriation to the County Planning Commission for the carrying on of its work as in the judgment of such Board of Commissioners of Roads and Revenues of Fulton County may be deemed advisable.

Appropriation.

Section 6. Immediately upon the approval of this Act the Board of Commissioners of Roads and Revenues for Fulton County shall elect the members to comprise said Planning Commission, being four (4) in all, (together with the chairman of said board as ex-officio member thereof and the clerk of said board as ex-officio clerk of said commission) and in electing them they shall designate that the terms of two of said members shall expire on

Members and terms.

January 1, next thereafter, and that the terms of two of said members shall expire on January 1, 1942. As the terms of said members of said Planning Commission expire their successors shall be elected for a term of four (4) years.

Zoning plan.

Section 7. Said Planning Commission shall prepare and submit to the Board of Commissioners of Roads and Revenues for Fulton County a comprehensive plan for zoning said county, for the purpose of suggesting the proper location of streets, apartment houses, dwellings and other uses of property or land, the height of buildings, the area of the lot to be occupied, the provision of yard space and the fixing of building lines. It is not intended by this provision to vest in this Planning Commission, or for that matter, in the Board of Commissioners of Roads and Revenues, authority to forthwith adopt a planning or zoning resolution. Said Board of Commissioners of Roads and Revenues of Fulton County, may, however, receive from said planning Commission a comprehensive plan for zoning and then proceed to adopt the same as hereinafter provided.

Adoption of zoning plan.

Section 8. Upon receipt of the comprehensive plan herein mentioned from said County Planning Commission the Board of Commissioners of Roads and Revenues of Fulton County, Georgia, may accept or reject the report; they may adopt an entirely new plan or they may adopt the plan of the said Planning Commission in modified form. Before proceeding to the consideration of such an adoption, however, the county authorities shall advertise once a week for four weeks in a newspaper published in said county the fact that on a given date they will proceed with the consideration of the plan offered by the Planning Commission, so that the public may be informed of the action contemplated by the said county authorities. On the day named in the notice they shall proceed to the adoption of said plan (in modified form if they so desire)

or some other plan of their own and may continue the hearing from day to day or to any named day until they take final action on the same.

Method of amending zoning plan.

Section 9. After the adoption of said comprehensive plan or zoning resolution herein provided for, the same may be modified, amended and designated areas therein changed and the rules governing the erection and construction of buildings modified and changed in the following manner: Said Planning Commission may submit to the county authorities of Fulton County, Georgia, any recommendation as to change. Said commission upon receipt of such a suggestion or report shall set a time (day and hour) for the hearing of said proposed change and give notice to the public thereof by publishing notices in the newspaper in said county in which the sheriff's advertisements are published once a week for at least three weeks. On the day and hour appointed the Commissioners of Roads and Revenues of Fulton County shall proceed to hear and determine the recommendation of said Planning Commission in this regard and dispose of the same. They have the right to continue the hearing from day to day or to any named day as in their discretion they may deem it advisable. Said commissioners of Roads and Revenues of Fulton County, Georgia, may on their own motion (without recommendation from the Planning Commission) proceed to modify or amend such zoning or planning resolution as may have been established and make such modifications or amendments as they may see fit, provided they proceed first by passing a formal resolution that they will on a certain day named proceed to consider such amendment, modification or change and give notice thereof in the same manner as provided herein, for other notices.

Rules of Commission.

Section 10. The County Planning Commission shall adopt such rules and regulations as they may deem advisable for the governing of their commission and adopt

APPENDIX A

Public hearings.

such rules and regulations as they may deem advisable for the public to appear before said Planning Commission and be heard as to any changes, modifications or amendments to any planning or zoning resolution that may have been passed by any county authority; and they may require a deposit of such advertising costs or other costs as they may in their discretion see fit, before they will conduct a hearing in regard to any application in regard to any change, modification or amendment and before they will recommend the same to the Commissioners of Roads and Revenues of Fulton County, Georgia.

Zoning districts.

Section 11. The Board of Commissioners of Roads and Revenues for Fulton County, Georgia, may, in the interest of public health, safety, order, convenience, comfort, prosperity or the general welfare of the community, adopt by resolution a plan or plans for the districting and/or zoning of the territory and land in Fulton County, Georgia, (outside of incorporated areas), for the purpose of regulating the location of businesses, trades, industries, residences, apartment houses, hotels, dwellings, outhouses, or any other uses of property or land, or for the purpose of regulating the height, kind and dimensions of buildings or other structures; also they may prescribe for the same purposes the area or dimensions of the lots and the yards used in connection with any buildings or structures to be erected and occupied for any purpose set out in this section; or they may in their discretion regulate the alignment of buildings and structures and prescribe their distance from the street along the front thereof. The zoning regulations made may be based on any one or more of the purposes above described. The county may be divided into such number of zones or districts and such districts may be of such shape and area as the county authorities may deem best suited to attain the purpose of the zoning regulations. Such county authorities may go into congested areas and prescribe zoning regulations for any part of or all of such congested areas and they are

to be the judges of where such congested areas may be and the extent and limitations thereof. In the determination and establishment of districts and regulations, classifications may be based on the nature or character of the trade, industry, profession or other activity conducted or to be conducted upon the premises or land, the number of persons, families or other group units to reside in or use such buildings, the public, quasi-public, or private nature of the use of the premises or land, or upon any other basis or bases relevant to the promotion of the public health, safety, order, morals, convenience, prosperity, or welfare of the community.

Residential restrictions.

Section 12. For the reasons herein stated said county authorities shall have the right and power, in any districts proposed to be set aside primarily for residence purposes, to further classify the use thereof and to provide therein the class or classes of residents to be housed therein and to provide therein such other and similar regulations and restrictions as shall secure the peace and good order of the county and the residents thereof.

Plan to be submitted before resolution adopted.

Section 13. No resolution adopting zoning regulations as above authorized shall be passed by the Commissioners of Roads and Revenues of Fulton County, Georgia, until after a comprehensive plan for the zoning of the county has been prepared and submitted to the Commissioners of Roads and Revenues of Fulton County by the Planning Commission; and the same may be adopted modified or repealed, provided notice is given thereof in the same manner as provided for modifications and changes as in this Act set out.

Administration.

Section 14. The zoning regulations here authorized and adopted by said county authorities shall be administered by the inspector of buildings and/or some other designated official under the rules and regulations of the Board of Zoning Appeals.

APPENDIX A

Fulton Planning Commission Created.

Board of Zoning Appeals.

Section 15. The Board of Commissioners of Roads and Revenues for Fulton County are authorized to create a Board of Zoning Appeals which said Board shall hear and decide appeals from, and review any order, requirement, or determination made by, the inspector of buildings in the enforcement of zoning regulations or made by any other official of the county to whom the enforcement of these regulations may be delegated. The Board of Zoning Appeals in its administration of said regulations may permit an exception to the regulations herein provided for and shall lay down rules and regulations for hearings on petitions for such exceptions to the said regulations, and grant or reject the same as in their judgment may seem best.

Personnel of appeal board.

Section 16. The Board of Zoning Appeals here authorized shall consist of any number of citizens (not exceeding) four (4) appointed by the Board of Commissioners of Roads and Revenues of Fulton County, Georgia, in the same manner and at the same time as the Planning Commission may be appointed. Said Commissioners of Roads and Revenues if they see fit may declare that the Planning Commission may exercise all the functions of the Board of Zoning Appeals and if they so determine such Board of Zoning Appeals will be the same as the Planning Commission until such time as the Board of Commissioners of Roads and Revenues of Fulton County may see fit to change the same and appoint a separate personnel for said purpose.

Certiorari from superior court.

Section 17. Every decision of the Board of Zoning Appeals in the administration of the authority hereinabove set out and in the administration of zoning regulations of said county shall be subject to writ of certiorari issued from the superior court upon the same terms as such writs are issued in any case.

Section 18. Be it further enacted by the authority aforesaid that any property in Fulton County heretofore

APPENDIX A

zoned by any proper authority heretofore existing shall not be changed or upset by reason of the authority here given for the zoning or planning; but all said property shall remain zoned as if this Act had not been passed until such time as the proper county authorities, may, in their discretion re-zone said property, and when so re-zoned for said purpose it shall be done under the authority and in the manner here prescribed. Previous zoning.

Section 19. Be it further enacted that any person, firm or corporation violating any of the provisions of this Act or any restrictions imposed by authority of this Act, or violating any regulations of any county authority made in pursuance of this Act, shall be guilty of a misdemeanor, and upon conviction, shall be subject to fine or imprisonment or both, as provided by law, in misdemeanor cases. Punishment for violation of Act.

Section 20. Be it further enacted by the authority aforesaid that every violation of the terms of this Act by any person, firm or corporation or a violation by such parties of the rules and regulations prescribed by the county authorities in pursuance with this Act shall be termed a nuisance and a continuing nuisance so long as such violation may be continued and such violation may be subject to abatement as a nuisance as provided by the laws of this State. Violation a nuisance.

Section 21. Be it further enacted by the authority aforesaid that the authority herein given to the county authorities under the terms and conditions of this Act may be enforced by the county, or proper county authority, by injunction or otherwise. This authority is cumulative and is not to be construed as curtailing the right of any person, firm or corporation, resident, property owner or other persons, of bringing any proper action for the enforcement of this Act or of such rules and regulations as may be promulgated by county authorities in pursuance of this Act. Injunction.

Fulton Planning Commission Created.

Present zoning laws of force until provisions of this Act are carried out.

Section 22. Be it further enacted by the authority aforesaid that until the adoption of a comprehensive zoning plan by the authorities of Fulton County which is provided for in this Act, that the present laws of force and effect in said county concerning zoning shall remain of force and effect; it being contemplated by this Act that the present zoning law for Fulton County passed at the Extraordinary Session of the General Assembly of Georgia (Acts Extraordinary Session 1937-38 p. ....) are to remain in force and effect until the time herein set out; namely: upon the adoption by said Board of Commissioners of Roads and Revenues of Fulton County of a comprehensive zoning plan as provided for in this Act; and that in the meantime said present law is in no wise amended, modified or repealed except in the following manner: it is hereby specifically provided that immediately upon the approval of this Act the commissioners may elect and set up and organize the County Planning Commission provided for in this Act, and that said County Planning Commission shall immediately take over the duty of receiving applications, conducting hearings and administering the present zoning regulations under the Act passed at the Extraordinary Session aforesaid, under such rules and regulations as may be prescribed by said Board of Commissioners of Roads and Revenues for Fulton County, Georgia; such petitions for zoning as may be pending before the board of Commissioners of Roads and Revenues for Fulton County, Georgia may be transferred by the Board of Commissioners to the county planning Commission with a definite date fixed for their hearing so that those interested may be notified. On the day and hour named by the Board of Commissioners of Roads and Revenues for the hearing of such pending petitions the County Planning Commission may proceed to hear them or if in their judgment it so desires postpone them until a definite time for such hearing. The County Planning Commission in administering the present law

will keep minutes or records and return a record of its findings to the Board of Commissioners of Roads and Revenues for Fulton County so that the same may be spread upon the minutes of said board.

Section 23. Be it further enacted that if any part, parts or section of this Act should for any reason be declared unconstitutional, such decision shall not affect the validity of any remaining portion of this Act, which remaining portion shall remain of force as if such Act had been passed with the unconstitutional portion thereof eliminated, and it is hereby declared the intention of the General Assembly that it would have adopted the remaining portion of this Act without including therein any such part, parts or section which may for any reason be hereafter declared unconstitutional.

Section 24. The rules and regulations adopted by the Planning Commission here authorized, or the governing authorities of Fulton County shall have the force and effect of law; and said Planning Commission and said governing authorities being hereby clothed with all of the authority which the General Assembly can grant to such authorities and such Planning Commission under the laws of the State of Georgia. Grant of authority.

Section 25. This Act shall take effect upon its approval. Effective date.

Section 26. Be it further enacted that all laws and parts of laws in conflict with this Act are hereby repealed.

Approved February 21, 1939.

GLASCOCK BOARD OF COMMISSIONERS CREATED.

No. 10.

An Act to create a Board of Commissioners of Roads and Revenues in and for the County of Glascock; to name the members thereof until their successors are elected

APPENDIX B

No. 27484. F. P. PLAZA, INC. et al. v. WAITE et al.

GUNTER, Justice. This case comes here on appeal from a judgment of Fulton Superior Court which declared certain "notice provisions" of the Fulton County Comprehensive Zoning Resolution unconstitutional because of their violation of the "due process" and "equal protection" requirements of the Georgia and Federal Constitutions.

We hold that the judgment below was erroneous and must be reversed.

Appellants made proper application to rezone certain land in Fulton County located on the boundary line between Fulton and DeKalb Counties. The land was eventually rezoned by the Fulton County Commissioners in accordance with the application for rezoning, but the appellees, all property owners or occupants of property in DeKalb County, attacked the rezoning in this lawsuit as being invalid.

Whether the owners and occupants of land in one county can have standing to attack the rezoning of land in another county is a very interesting question, but because of the facts in this case applied to the law as we interpret it we do not have to reach that issue in deciding this case.

The crux of the attack against the rezoning by the appellees was that they did not have "notice" of the rezoning proceedings as required by law, that their property rights were affected by the rezoning, and the rezoning was therefore in violation of their

consitutional "due process" and "equal protection" rights.

The Georgia Constitution provides for zoning by counties. Code Ann. §§ 2-1923 and 2-8404.

The authorization contained in our Constitution for a county to zone property within its jurisdiction includes the right to rezone property which had already been zoned. See *Kirkpatrick v. Candler*, 205 Ga. 449 (53 SE2d 889).

Section 8 of Act No. 825, Ga. L. 1952, p. 2689, provided that the governing authority of Fulton County could adopt a comprehensive zoning plan for the county. Section 9 of that same Act, Section 9 having been later amended in 1968, provided the procedure for rezoning or the amendment of the zoning resolution of the county.

According to Section 9 (Ga. L. 1968, p. 3769) an application for rezoning must be filed with the planning commission "which shall proceed to hold a public hearing thereon after notice to interested parties, in accordance with the rules and regulations adopted by the authorities in charge of county affairs as a part of the zoning resolution."

Art. XXVIII, Sec. 3, Par. 2 of the Fulton County Zoning Resolution provides that the planning commission (Atlanta-Fulton County Joint Planning Board) shall hold "preliminary public hearings" on all rezoning applications and that notice of such preliminary hearing shall be given by placing a sign on the property sought to be rezoned and by mailing a notice of the hearing by regular mail to all property owners within three hundred feet of the subject property as their "ownership and address appear on the tax records of Fulton County."

It is thus seen that the only notice required to be given with respect to the preliminary public hearing before the planning commission is the posting of the sign on

the property and mailing a notice to specified property owners. For the preliminary hearing there is no requirement of notice by publication.

It is also significant, especially in relation to procedural due process and equal protection, that the planning commission has no authority to rezone property; the extent of the planning commission's power is to make recommendations to the governing authority; and the power to rezone property is vested totally and exclusively in the governing authority of the county under the law.

We therefore hold that defective notice or lack of notice of the preliminary hearing before the planning commission, which cannot rezone property so as to deprive a party of his property rights, is not violative of procedural due process or equal protection, provided such party has due and legal notice of the hearing on the matter of rezoning before the county governing authority, the body which can rezone land and thereby deprive a party of his property rights. Procedural due process is afforded if an affected party has an opportunity to be heard at any time before the rezoning decision is reached by the county governing authority.

We next looked to see what notice is required to be given for a rezoning hearing conducted by the governing authority. Section 9 of the statute (Ga. L. 1968, p. 3769) provides that notice of the hearing before the governing authority shall be published once a week for at least three weeks in the official county newspaper prior to the holding of the public hearing. Sec. 4 of Art. XXVIII of the county zoning resolution provides for exactly the same notice of the public hearing before the governing authority as is provided for in the statute. It is conceded that this notice by publication required by the statute and the zoning resolution was given.

We hold that such notice by publication of a rezoning hearing to be held by a governing authority of a county

is proper and adequate insofar as the requirements of procedural due process and equal protection are concerned. Such notice by publication puts all parties, wherever located, on notice that a public hearing will be held at the stated time and place before the governing authority which is considering an application to rezone land under the jurisdiction of the governing authority. We have held that such notice by publication is all that affected property owners are entitled to, and that their legal or constitutional rights are not violated by the rezoning of property when such notice by publication is given. See *Willingham v. White* 229 Ga. 75 (189 SE2d 442).

It follows that the notice given to the appellees in this case was not constitutionally deficient, and the trial court erred in holding that it was.

The appellees argue in this court that if the notice given was not constitutionally deficient, then there are still other issues to be decided in the trial court with respect to the validity of the rezoning action taken by the Board of Commissioners of Fulton County on June 7, 1972. These issues relate to the manner by which the Board of Commissioners reached its decision between the dates of May 3, 1972, through June 7, 1972.

These contentions of the appellees are without merit, because Sec. 9 of the statute (Ga. L. 1968, p. 3769) empowering the governing authority of Fulton County to rezone property provides that after the hearing before the governing authority on the proposed change, the governing authority "shall have the right to continue the hearing from day to day, or to a named day, or may withhold final action thereon pending further consideration and investigation on their part, ..."

It is thus seen that the governing authority of Fulton County is given by law absolute authority with respect to the rezoning of property within its jurisdiction.

Before a rezoning decision by it, it must properly advertise and hold a public hearing at which all interested citizens and property owners can make their views known to the governing authority with respect to the proposed rezoning decision. However, once that notice is given and that hearing is conducted before the governing authority, it then has almost unrestricted authority with respect to the time and manner in making its decision.

The flexibility of the procedure and the extent of the power conferred upon the governing authority to rezone land may be subject to criticism, but it is not illegal or unconstitutional.

Upon review of the entire record we find no legal infirmity in the rezoning action taken by the Board of Commissioners of Fulton County on June 7, 1972.

Judgment reversed. All the Justices concur.

ARGUED OCTOBER 11, 1972 — DECIDED FEBRUARY 8, 1973 — REHEARING DENIED FEBRUARY 22, 1973.

Injunction. Fulton Superior Court. Before Judge McKenzie.

Stack, O'Brien & Neely, Edgar A. Neely, III, David J. Keeler, for appellants.

Greene, Buckley, DeRieux & Jones, Ferdinand Buckley, Raymond H. Vizethann, Jr., for appellees.

Webb, Parker, Young & Ferguson, Robert G. Young, amicus curiae.

APPENDIX B

SUPREME COURT OF GEORGIA

ATLANTA, February 22, 1973

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

F. P. Plaza, Inc., et al. v. Jordan C. Waite et al.

Upon consideration of the motion for a rehearing filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA, March 29, 1973

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Hazel E. Thelford, Deputy CLERK.

ent No. 9.

APPENDIX B

IN THE SUPERIOR COURT FOR THE COUNTY OF FULTON
STATE OF GEORGIA

JORDAN C. WAITE, NANCY F. WAITE, DEAN B. GOING, ROBIN GRAY, ALAN BURNHAM and all others similarly situated, Plaintiffs, -vs- GOODWYN (SHAG) CATES, CHARLIE BROWN and MILTON FARRIS (Members of the Fulton County Board of Commissioners of Roads and Revenues), EARL GARNER, (Director of Inspections and Licenses Department of Fulton County), F. P. PLAZA, INC. and ASA G. CANDLER V. and ROBERT S. GRIFFITH, JR., d/b/a CANDLER-GRIFFITH CO., Defendants.	CIVIL ACTION, FILE NUMBER B-75365

ORDER

The above styled matter came on for a hearing on June 2, 1972 on plaintiffs' motion for a temporary restraining order, at which time a partial restraint was entered and at request of counsel the hearing was continued until Thursday, June 8, 1972. Counsel then asked for additional time to complete the record and the Court thereafter on June 14, 1972 entered a detailed order which speaks for itself. Thereafter, counsel for all parties entered into a stipulations of fact, with pertinent exhibits attached, and asked the Court to allow them to submit the entire case for final disposition at the trial level. The Court agreed and on Friday, July 7, 1972, at 5:00 o'clock p. m., after extensive argument, the matter was submitted to the Court without

a jury for said final disposition.

The Court has given careful consideration to the evidence, the arguments and briefs of counsel, and now makes the following findings:

Article XXVIII, Section 3, Subparagraph 2 of the Fulton County Comprehensive Zoning Resolution, which sets requirements of publication and mailing of notice to affected property owners is in contravention of federal and Georgia constitutional requirements of "due process" and "equal protection of the laws" and is therefore unconstitutional and void.

In the enactment of zoning ordinances and amendments thereto the Fulton County Board of Commissioners is limited to the specific authority conferred by statute. (Morgan v. Thomas, 207 Ga. 660)

The Georgia laws do vest in said Commissioners broad powers to zone property but the law requires strict compliance with requirements of notice and hearings. These statutes require the Board of Commissioners, before making any modifications or amendment to the zoning resolutions, to hold public hearing, with prior notice thereof, to all interested parties. (Ga. L. 1939, p. 584; Ga. L. 1952, p. 2689; Ga. L. 1968, p. 3769; Code of Laws, Fulton County, Sec. 24-109)

The Supreme Court of this state has held repeatedly that "due process" of law as guaranteed by Article I, Sec. I, par. III, of the Constitution, Ga. Code Ann., Sec. 2-103, includes notice and hearing as a matter of right in matters where one's property

rights are involved. (Sikes v. Pierce, 212 Ga. 567; and cases cited therein)

There could seem to be no doubt that a zoning ordinance that does not provide for hearing and notice of hearing to all parties affected thereby is clearly in contravention of the constitutional requirements of due process and is therefore unconstitutional and void.

Since the applicable Georgia laws in this case require notice to all interested parties, notice requirements embodied in zoning ordinances enacted pursuant to such law must be strictly complied with in any zoning action taken by the governing authorities. Said Fulton County Zoning Resolution requirements for notice are invalid per se, as well as in the application to these plaintiffs, for the following reasons:

Article XXVIII, Secs. 3 and 4 of the Fulton County Comprehensive Zoning Resolution requires that written notice shall be given by regular mail to all property owners within three hundred (300) feet of the subject property; but said section then imposes the inconsistent limitation that said notice shall be mailed only to property owners as ownership and address appear on the tax records of Fulton County.

The evidence shows that the application of said requirements in general,and in this case in particular, require legal publication in Fulton County Daily Report only and that notice be mailed to all property owners within three hundred (300) feet of the subject property (but only as appears on the tax records of

APPENDIX B

Fulton County). The plaintiffs, some of whom own land adjoining subject property, are residents of DeKalb County.

Such provisions are violative of the federal and Georgia Constitutions in that they deprive plaintiffs, and others similarly situated, of due process of law and the equal protection of the law, because said regulations require notice to Fulton County property owners by publication and by mailing, but require no notice by either publication or mail to residents and property owners located in DeKalb County immediately adjacent to Fulton County, and the subject property of the rezoning in this case.

The "Equal Protection of Law" clause of the Federal Constitution is offended whenever a public law is applied differently to different persons under similar circumstances. In other words, the constitutional guarantee of equal protection requires that all persons be treated alike under like circumstances and conditions.

The Court finds, both as a matter of fact and law, that plaintiffs were denied due process and equal protection under the applicable zoning regulations and the actions of the Board of Commissioners pursuant thereto.

IT IS THEREFORE ORDERED AND DECREED that said actions of the Board of Commissioners attempting to rezone subject property constitute an infringement on plaintiffs' property rights and are hereby declared void and of no force and effect.

APPENDIX B

Any action taken pursuant to said attempt to rezone said property would constitute a clear and present danger of irreparable damage to plaintiffs' property and, therefore, defendants F. P. PLAZA, INC., ASA G. CANDLER V and ROBERT S. GRIFFITH, JR., d/b/a CANDLER-GRIFFITH CO. are permanently enjoined from instituting any action in non-conformity with the original R-2 zoning which, by reason of this ruling, now appertains.

IT IS SO ORDERED.

This 11th day of July, 1972.

JUDGE, SUPERIOR COURT, A. J. C.

FILE COPY

Supreme Court, U. S.
FILED
JUN 22 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1563

JORDAN C. WAITE, ET AL,
Petitioners,

versus

F. P. PLAZA, INC., ET AL,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITIONER FOR WRIT OF CERTIORARI

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Fulton County).

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1972

No. 72-1563

JORDAN C. WAITE, ET AL,
Petitioners,

versus

F. P. PLAZA, INC., ET AL,
Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Supreme Court of the State of Georgia printed in Appendix B of the Petition is reported in 230 Ga. 161, and the denial of rehearing is reported in 230 Ga. 165.

JURISDICTION

Respondents acknowledge that jurisdiction of this Court is requested under 28 U.S.C. §1257(3) but respectfully submit that no substantial Federal question is presented.

QUESTIONS PRESENTED

Where the subject zoning ordinance provides notice of Planning Board Hearings by:

1. A sign posted conspicuously on the property not less than six feet square, containing information as to the change in zoning classification and the pertinent data of the hearing to be posted at least two weeks before the hearing; and

2. Similar notice by regular mail to all property owners within 300 feet of the subject property as ownership and addresses appear on the tax records of Fulton County; and

as to Board of Commissioners Hearings by:

1. Notice published once a week for three weeks in the newspaper in which sheriff's advertisements are published and that notice of the Planning Board hearing and the Board of Commissioner's hearing may be given simultaneously; pursuant to the requisites of the State Enabling Act, and where the ordinance provides for public hearings without restriction; are not the tenets of procedural due process and equal protection met as to residents of an adjoining county who have notice and attend the public hearings.

SUMMARY OF ARGUMENTS

1. The lower decision does not represent a departure from prior decisions interpreting due process and

equal protection issues regarding legislation establishing the power to zone property under the police power.

2. The instant case turns upon its own peculiar facts and does not involve a substantial Federal question.

3. The notice requirements of the ordinance meet and exceed the rudiments of due process and equal protection of the United States Constitution, as interpreted by this Court.

4. The notice requirements of the subject ordinance were complied with, and Petitioners had actual notice and attended the public hearings prior to exercise of the zoning power.

STATEMENT OF THE CASE

On September 15, 1971, Respondents F. P. Plaza, Inc. (Defendants in the Trial Court and Appellants in the Georgia Supreme Court) filed zoning petitions in the Fulton County Zoning Administrator's Office, requesting rezoning of certain properties in Fulton County from R-2 (Residential) to O-I (Office-Institutional). The subject property and the surrounding Fulton County properties were set forth on scheduled plats drawn by the Fulton County Zoning Administrator.

It is undisputed that the subject property was entirely within the jurisdiction of Fulton County, with a conspicuous sign posted on the property prior to the Planning Board Hearing which advertised both the Hearing before the Planning Board and the Board of Commis-

sioners. The advertisement of the Zoning Applications were published in the Fulton County *Daily Report* on October 6, 13, and 20 of 1971, prior to the Planning Board Hearing and the hearings of the Fulton County Commissioners, in compliance with the directives of the Fulton County Zoning Ordinance, Article XXVIII, Sections 3 and 4. The advertisement gave the date and place of both hearings. The Enabling Act only requires notice by advertisement. The Ordinance requires three composite forms of notice, i.e., posting the property conspicuously, publication in the official county organ, and notification to those residents of Fulton County who reside within three hundred feet of the subject property, as their names appear on the Fulton County Tax Digest. It is undisputed that the statutory requirements of notice were complied with by Respondents.

Subsequent to the initial Planning Board meeting, a public hearing was held by the Fulton County Board of Commissioners on November 7, 1971, at which time the Commissioners voted to defer action on each of the particular petitions. The matter was reheard on April 5, 1972, and May 3, 1972. The named Plaintiffs (DeKalb County residents) submitted letters and petitions to the Fulton County Zoning Commissioners [R-120-144][1] and were in attendance at the various public hearings.

Due to the Fulton County Board of Commissioners imposition of a different use, T-R (Townhouse-Residential), on a portion of the subject property, for which

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[1]Reference is to unprinted certified transcript of the record numbered pages.

T-R use no application had been made, requested, nor advertised, the Board's action was not binding in this regard. Therefore, the subject property was again considered at the June 7, 1972, public meeting when final action was taken and the entire property was zoned O-I. Petitioners' filed their action on June 2, 1972, seeking and obtaining after hearing, entry of certain injunctive restraints. The Trial Court expressly did not enjoin or impede the legislative actions of the Fulton County Board of Commissioners, which adopted a rezoning resolution, rezoning the property in its entirety to O-I, as applied for, requested, and advertised.

Subsequently, the Trial Court entered its Order of July 11, 1972, and, upon its definition of due process and equal protection, stated, as a matter of fact and law, that the Petitioners were denied due process and equal protection under the applicable zoning regulations of Fulton County and the actions of the Board of Commissioners pursuant thereto.

The Georgia Supreme Court reversed the Trial Court and held the Georgia Enabling Act and Fulton County Zoning Resolution did not violate the due process or equal protection guarantees of the Georgia and the United States Constitutions. The Georgia Supreme Court held that the composite means of notice, provided in the Fulton County Zoning Resolution, i.e. (1) publication, (2) posting, and (3) mailed notice to those owners of property within three hundred feet of the subject property, as listed in the Fulton County Tax Records, satisfied the requirements of the Georgia En-

abling Act and the requirements of procedural due process and equal protection.

REASONS FOR DENYING THE WRIT

The decision of the Supreme Court of Georgia does not represent even a small departure in legal reasoning from any of this Court's decisions on due process and equal protection. Both the Georgia Enabling Act and the Zoning Ordinance (Ga. Laws 1939, p. 584; Ga. Laws 1952, p. 2689; Ga. Laws 1968, p. 3769), enacted pursuant thereto, provide for express means of notice and hearing prior to exercise of the police power in effecting zoning regulations within the Fulton County jurisdiction.

Secondly, the instant case arises because the Petitioners take issue with the Zoning Ordinance of the adjacent county in the rezoning of certain parcels, totally contained within that county, due to the proximity of the subject property to the county line. The Georgia Court merely decided that, based upon the unique facts in this case, the composite notice of posting, publication, and mailing satisfied the basic necessities of due process and equal protection. It further determined that a rational basis had been established for the mailing of notice to certain county residents (those within three hundred feet of the subject property) who appeared as property owners on the Fulton County Tax Digest. Thus, the case turns upon its own peculiar facts and not upon the law applied.

REQUIREMENTS OF NOTICE

To summarize the legal notice required as to zoning in Fulton County, the enabling statute states that as to the Planning Board Hearing, notice to interested parties shall be in accordance with the rules and regulations adopted by the authorities in charge of county affairs. As to the hearing before the Board of Commissioners, the statute states that notice thereof shall be published prior to the holding of the same, such notice to state the nature of the proposed change and the date, hour and place of the meeting.

The requirements of notice set out in the rules and regulations of the Fulton County Comprehensive Zoning Resolution, are as follows:

Planning Board Hearing:

1. A sign must be posted conspicuously on the property not less than six feet square, containing information as to the change in zoning classification and the date of the hearing. The sign must be posted at least two weeks before the hearing.

2. Similar notice by regular mail shall be given to all property owners within 300 feet of the subject property. Said notice shall be mailed to property owners as ownership and addresses appear on the tax records of Fulton County.

Hearing before Board of Commissioners:

The Comprehensive Zoning Resolution states that the Board of Commissioners shall hold a public hearing at the first regular meeting following the hearing by the Planning Board, notice of which shall be given once a week for three weeks in the newspaper in which sheriff's advertisements are published and that notice of the Planning Board hearing and the Board of Commissioner's hearing may be given simultaneously.

The record in this case shows that the notice by sign posting and the notice by mailing, as well as the advertisement notice gave complete information about both hearings.

ACTUAL NOTICE RECEIVED

The Petitioners are residents of an adjoining county and claim that notice was not sufficient as to them and that they lived nearby. They particularly complain because the requirements of notice by mailing did not provide for notice to property owners in adjoining counties. They also say notice should have been given to nearby residents as well as property owners — which is accomplished by the conspicuous posting and newspaper advertisement.

Respondents state that not only the legal requirements for notice were complied with, but as a practical matter, all of the complaining parties did have notice of both hearings (Planning Board and Board of Commissioners) and attended them. There was no

evidence whatsoever that any of the Petitioners suffered for lack of notice in any way because they were in another county. They lived near the property and evidently read the sign, read the ad, or heard from their Fulton County neighbors because they attended the hearings en masse and submitted petitions [R-120-144].[2]

It is the position of respondents that the legal requirements for notice of hearings were adequate and constitutional, and that the parties complaining were aware of the hearings and attended the same.

Furthermore, there is little question that posting and publication are reasonable means of notice and are, in fact, the usual and accepted means in similar legislative, as opposed to judicial, actions of a governmental entity. *Aquino v. Tobriner*, 298 F.2d 674 (1961). With regard to the equal protection argument, presented by Petitioners, a review by this Court would have little, if any, effect on future litigants since the case arises only because of the proximity of the subject land to a county boundary.

As will be shown below, there is no real question that Plaintiffs failed to present a tenable basis to contest the Fulton County Zoning Ordinance on the basis of due process or equal protection.

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[2] Reference is to unprinted certified transcript of the record numbered pages.

DUE PROCESS

The elementary and fundamental requirements of due process in any proceeding which is to be accorded finality are hearing and notice of hearing prior to deprivation of any fundamental rights. *Hanna v. Plumer*, 380 U.S. 460, 85 S.Ct. 1136. In the instant case, there is no dispute as to the adequacy of the hearing. The only issue raised by Petitioners questions the matter of sufficient notice. It is well settled that due process requires no particular form of notice but only requires notice that is reasonably designed to afford the parties actual notice of hearing. *Hanna v. Plumer, Supra.* It is undisputed that Respondents complied with the requirements of the Fulton County Zoning Ordinance. All specified forms of notice were timely given; and Petitioners did, in fact, have actual knowledge of the preliminary hearings.

The Enabling Act of the Georgia Laws and the Fulton County Zoning Ordinance, pursuant thereto, clearly meet the State of Georgia directives of due process, as set forth in *Sikes v. Pierce*, 212 Ga. 567, 94 S.E.2d 427 (1956); *Robitzsch v. State*, 189 Ga. 637, 7 S.E.2d 387 (1940). However, the instant case is not one of a judicial action, condemnation, foreclosure or other process affecting property, but is an exercise of the police power in enacting zoning regulations affecting property within the Fulton County jurisdiction.

The test is whether the means of notice and hearing are in the interest of the community and are reasonable in relation to the subject matter. Petitioners rely

on *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652 (1950). *Mullane* arises out of a judicial proceeding and, therefore, ignores the need to balance the competing interests of the governmental entity with those of the individual. *Boulware v. Battaglia*, (D.C. Del. 1972), 344 F.Supp. 889. The type of proceedings and rights affected will determine if personal notice or constructive notice will suffice. *Jacob v. Roberts*, 223 U.S. 261, 56 L.Ed. 429, 32 S.Ct. 303 (1912); *Ballard v. Hunter*, 204 U.S. 241, 51 L.Ed. 461, 27 S.Ct. 26 (1907).

Petitioners, as DeKalb County residents, take issue with the Zoning Ordinance of Fulton County, which requires publication of notice in the official newspaper of Fulton County and conspicuous posting of the property. It is clear that the Petitioners have no direct ownership or claim to the property, the subject of the zoning procedure.

Petitioners have not, as residents of an adjoining county, demonstrated that further notice is essential, workable, or reasonable in Fulton County's (the governing jurisdiction) exercise of the police power. The Petitioners clearly failed to show that, as residents of an adjacent but distinct jurisdiction, their names and addresses were easily ascertainable and accessible to the Fulton County Board of Commissioners in administering the rezoning of certain Fulton County property. The notice and hearing requirements, set forth in the Ordinance, comply with the directives of this Court relative to procedural due process in the legislative functions of government under the police

power. If Petitioners have any complaint whatsoever with respect to the *additional* (mailed) notice, it must fall under the doctrine of equal protection.

EQUAL PROTECTION

The question presented with regard to equal protection is whether the classification of recipients of the mailed notice in rezoning proceedings constitutes an irrational, invidious discrimination, lacking *any* compelling State interest.

It is evident from the facts that DeKalb County residents are not general participants in the electoral and political process of Fulton County. They are subject neither to the taxation powers of Fulton County, nor to assessments for improvements within Fulton County borders. There is a definite division and dichotomy between the two counties and their residents. Therefore, there is a rational basis for distinction and classification of the notice (publication and posting), afforded DeKalb County residents in the *in rem* zoning proceedings, as compared with the notice afforded those Fulton County residents who reside within three hundred feet of the subject property.

Neither the constitutional requirements of equal protection nor of due process prohibits classification between different groups so long as a reasonable basis for that distinction exists. *Whitney v. State Tax Commissioner of New York*, 309 U.S. 530, 60 S.Ct. 635, 84 L.Ed. 909 (1940). The Supreme Court of the State of Georgia has concurred with this principle and has up-

held the notice classification as having a rational basis. Furthermore, as stated in *Powell v. Power*, 436 F.2d 84, (2nd Cir. 1970):

> "Uneven or erroneous application of an otherwise valid statute, constitutes a denial of equal protection *only* if it represents intentional or purposeful discrimination. *Snowden v. Hughes*, 321 U.S. 1, 8, 84 S.Ct. 397, 88 L.Ed. 497 (1944). See *Swain v. Alabama*, 380 U.S. 202, 204, 205, 85 S.Ct. 824 13 L.Ed.2d 739 (1965); *Oyler v. Boles*, 368 U.S. 488, 82 S.Ct. 501, 7 L.Ed.2d 446 (1962) ... [W]e cannot believe that the framers of our Constitution were so hypersensitive to ordinary human frailties as to lay down an unrealistic requirement that elections be free of any error." [Emphasis supplied.]

Further definition, as given in *Grunewald v. Gardner*, 390 F.2d 591, (2nd Cir. 1968), at Page 592:

> "It is only the invidious discrimination or the classification which is patently arbitrary and utterly lacking in rational justification which is barred by either the due process or equal protection clauses. *Fleming v. Nester*, 360 U.S. 603, 611, 80 S.Ct. 1367, 4 L.Ed.2d 1435 (1960); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 489, 75 S.Ct. 461, 99 L.Ed. 563 (1955). The state has a wide scope of discretion in creating legislative classifications and according different treatment to members of the differing classes. *McGowan v. State of Maryland*, 366 U.S. 420,

> 425 (1961). The only limitation which the equal protection clause places on this power is that a classification must rest upon some real difference which bears a reasonable relationship to a legitimate legislative purpose. See *Gulf, Colorado, and Santa Fe Railroad v. Ellis,* 165 U.S. 150, 155-157 (1897)."

Fulton County mailed notice to Fulton County property owners who, of record, owned property within three hundred feet of the subject property. The classification is reasonable, workable, and rationally consistent with the interests of the community — the county having jurisdiction. Therefore, it meets the requisites of the constitutional standard. *West Coast Hotel v. Parish,* 30 U.S. 379, 391, 57 S.Ct. 578, 81 L.Ed. 703 (1937).

Further, this Court has recently held that, even if a procedure would result in a disadvantage to one group, the disadvantage does *not* necessarily deem the law unconstitutional as violative of equal protection. *James v. Valtierra,* 402 U.S. 137, 142, 28 L.Ed.2d 678, 91 S.Ct. 1331 (1971). Therein this Court stated, at Page 142:

> "But of course a law making procedure [which] disadvantages a particular group does not always deny equal protection. Under any such holding, presumably a state would not be able to require referendums on any subject unless referendums are required on all, because they would always disadvantage some

> group. And this Court would be required to analyze governmental structures to determine whether gubernatorial veto provisions or a filibuster was likely to 'disadvantage' any of the diverse and shifting groups that make up the American people."

This Court has further stated, in the landmark decision of *Dandridge v. Williams*, 397 U.S. 471, 485, 90 S.Ct. 1153 L.Ed.2d 491 (1970) [which case, despite the existence of factual differences from the case at Bar, states the constitutional standard]:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'. *Lindsey v. Natural Carbonic Gas Company*, 220 U.S. 61, 78, 55 L.Ed. 369, 31 S.Ct. 337. The problems of government are practical ones and may justify, if they do not require, rough accommodations . . . A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 426, 6 L.Ed.2d 393, 81 S.Ct. 1101."

The legitimate governmental interest of the Fulton County Board of Commissioners in administering the

exercise of the police power in the zoning area has been stated above. The equal protection clause does not compel uniformity in the face of difference nor sacrifice the governmental interest in making realistic and reasonable distinctions in classifications. *Whitney v. State Tax Commissioner of New York, Supra.* The requirements of the Georgia Enabling Act and the Fulton County Zoning Ordinance are not prohibitive, arbitrary, nor capricious classifications effected to intentionally discriminate. Rather they are effected for the continuing function of the governmental entity.

There is neither a substantial Federal question presented in the instant matter, nor a question which is likely to be of any continuing significance. The matter arises from a unique situation and is brought by Petitioners who take issue with an adjoining county's zoning ordinance provision relative to mailed notice after having received notice via conspicuous posting and publication.

CONCLUSION

For the above stated reasons, it is respectfully submitted that the petition for writ of certiorari does not present a substantial Federal question and should be denied since the decision of the Supreme Court of Georgia is not in conflict with the United States Constitution or any decision of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the ____ day of June, 1973, three copies of the petition for Writ of Certiorari were mailed, postage prepaid, to each party separately represented in the proceeding and required to be served pursuant to Rule 33(1) and (3), Rules of the Supreme Court of the United States.

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FILE COPY

Supreme Court, U. S.
FILED
JUL 17 1973
MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

NO. 72-1563

JORDAN C. WAITE, ET AL,

Petitioners

versus

F. P. PLAZA, INC., ET AL,

Respondents

SUPPLEMENTAL BRIEF OF PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

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SUPREME COURT
UNITED STATES OF AMERICA

NO. 72-1563

JORDAN C. WAITE, ET AL,

Petitioners

versus

F. P. PLAZA, INC., ET AL,

Respondents

SUPPLEMENTAL BRIEF OF PETITIONERS TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF GEORGIA

The petitioners Jordan C. Waite, et al., respectfully file this their supplemental brief to petition for Writ of Certiorari pursuant to Rule 24, Rules of the Supreme Court of the United States, to call attention to a recent case and decision of the United States Court of Appeals for the Fifth Circuit in support of the questions presented by petitioners and in direct conflict with the decision of the Supreme Court of the State of Georgia in the instant case.

A substantial Federal question presented in the petition for Writ of Certiorari is whether the acts of the County Board of Commissioners in meeting in private and changing their prior vote and taking new zoning action without the prerequisite of new notice and hearing deprives petitioners as affected property owners and residents herein of due process and equal protection in violation of Article XIV, Section 1 of the United States Constitution. In deciding essentially the same question the United States Court of Appeals for the Fifth Circuit held that the adjudicative decision inherent in tract rezoning requires the decision maker (County Board of Commissioners) to adhere to concepts of minimal due process; and that a decision by the Commissioners denying rezoning by recourse to non-record evidence denied the appellants procedural due process in violation of Article XIV, Section 1 of the United States Constitution. South Gwinnett Venture, et al., v. Pruitt, et al., -F.2d- (5th Cir.) (Decided April 4, 1973, Companion Case Nos. 71-3420, 71-3421) (Appendix A, infra).

Petitioners understand that a petition has been filed in this Court for review of the decision of the United States Court of Appeals for the Fifth Circuit in South Gwinnett Venture, et al. v. Pruitt, et al., (Appendix A, infra).

Petitioners respectfully submit that the granting of the petition for a Writ of Certiorari in this case is necessary to resolve the conflict between the decision of the Supreme Court of the State of Georgia in the instant case and the decisions of the United States Court of Appeals for the Fifth Circuit and of this Court that present

a well settled line of decision condemning administrative action by recourse to non-record evidence in violation of the concepts of minimal due process.

Review of the substantial Federal questions in this case by this Court is in the public interest as the questions are now twice presented in this Court and are likely to continue to be presented in other cases involving zoning administrative actions and the fundamental rights of due process and equal protection to be afforded those affected thereby.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of July, 1973, three copies of the Supplemental Brief of Petitioners to Petition for A Writ of Certiorari to the Supreme Court of the State of Georgia were mailed, postage prepaid, to each party separately represented in the proceeding and required to be served pursuant to Rule 33 (1) and (3), Rules of the Supreme Court of the United States.

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APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 71-3420

SOUTH GWINNETT VENTURE, a partnership composed of South Gwinnett Apartments, Inc., ET AL,
Plaintiffs-Appellants,

versus

W. R. (DUDGE) PRUITT, ET AL,
Defendants-Appellees.

No. 71-3421

ROCKBRIDGE ASSOCIATES, LTD.,
a Georgia Limited Partnership,
Plaintiff-Appellant,

versus

W. R. (DUDGE) PRUITT, ET AL,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Georgia

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(April 4, 1973)

2 SOUTH GWINNETT VENTURE v. PRUITT

Before WISDOM and INGRAHAM, Circuit Judges and BOOTLE, District Judge.

INGRAHAM, Circuit Judge: These appeals arose from suits filed in the district court by the respective plaintiffs, each against the Commissioners and the Chief Building Inspector of Gwinnett County, Georgia, each praying that certain portions of the zoning ordinance enacted by the Commissioners be declared unconstitutional and that the Chief Building Inspector issue building permits for the constructions of apartments upon the subject property. The district court dismissed the suits upon the motions of the defendants, holding that the rezoning applications called for a quasi legislative judgment by the zoning board, and as such the district court was without subject-matter jurisdiction to review the actions for anything more than arbitrariness and interest on the part of the board members.

The use of non-record secret evidence by the Gwinnett County Commissioners in denying appellants' application for the rezoning of certain tracts of land from single family residential classification to multi-family apartment use designations has projected purely local land use questions into a federal forum.

Contending that their applications had been denied by the Commissioners on evidence dehors the record and that the Commissioners' reliance on such evidence deprived them of due process, the appellants brought suit against the County Commissioners in federal district court asserting jurisdiction under 28 U.S.C. § 1331(a). The district court, noting that fed-

eral courts are properly loathe to stretch their limited jurisdiction to become super zoning boards of appeal, found the denial of an application for rezoning to be a quasi-legislative act. As such, the court reasoned it was not impermissible for the quasi-legislators to use non-record materials in exercising their judgment. Consequently, the court dismissed appellants' complaint. 341 F.Supp. 703 (N.D.Ga., 1971).

We differ in only one salient regard from the decision of the district court. Our difference concerns the nature of an application for the rezoning of a tract of land. As we recently noted in *Higginbotham v. Barrett*, ____ F.2d ____ (5th Cir., 1973) [No. 72-1526, February 14, 1973]:

> "The law is settled that the zoning of property, including the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis. *Shenk v. Zoning Commission of the District of Columbia*, D.C. Cir., 1971, 440 F.2d 295, 297; *Diedrich v. Zoning Commission of the District of Columbia*, D.C. Cir., 1967, 393 F.2d 666; *City of St. Paul v. Chicago, St. Paul, Minneapolis and Omaha Railway Company*, 8 Cir., 1969, 413 F.2d 762, 766-7. Cf. *Goldblatt v. Town of Hempstead*, 1962, 369 U.S. 590, 594-5, 82 S.Ct. 987, 8 L.Ed.2d 130."

The adoption of a legislative plan for the entire community must be distinguished from the treatment which a specific tract of land receives when its owner

petitions for reclassification under that plan. As the record in this case demonstrates, consideration of that petition is an exercise of legislative power in a case by case adjudicative setting. *Compare, Londoner v. Denver,* 210 U.S. 373 (1908) with *Bi-Metallic Inv. Co. v. State Board of Equalization,* 239 U.S. 441 (1915). *See, Hot Shops, Inc. v. Clouser,* 231 F.Supp. 825 (D.C., 1964), affirmed 346 F.2d 834 (D.C.Cir., 1965); and *Donovan v. Clarke,* 222 F.Supp. 632 (D.C., 1963). Cf. *State ex rel Ludlow v. Guffey,* 306 S.W.2d 552 (Mo., 1957); *Morton v. Mayor and Council of Clark Township,* 102 N.J. Super. 84, 245 A.2d 377 (1968). *See, generally,* K. Davis, Administrative Law Text. Thus distinguished from the legislative action of adopting a comprehensive zoning plan, the adjudicative decision inherent in tract rezoning requires the decision maker to adhere to concepts of minimal due process. *Hornsby v. Allen,* 326 F.2d 605 (5th Cir., 1964); *Hot Shops, Inc. v. Clouser, supra; Donovan v. Clark, supra.* Here, appellants' complaint alleged that rezoning of the property had been denied by the Commissioners without a statement of their reasons and by recourse to evidence which was not in the record. Such administrative action has long been condemned, *Morgan v. United States,* 304 U.S. 1 (1938); *Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292 (1937); *United States v. Abilene & Southern Ry. Co.,* 265 U.S. 274 (1924); *Interstate Commerce Commission v. Louisville & Nashville RR Co.,* 227 U.S. 88 (1913); *Hornsby v. Allen, supra,* and we do so here.

The orders of the district court are REVERSED and the causes REMANDED for proceedings consistent herewith.

BOOTLE, District Judge, dissenting:

I respectfully dissent. I would affirm for all reasons stated by the Trial Court in his memorandum opinion, *Rockbridge Associates, Ltd. v. Pruitt*, 341 F. Supp. 703 (N.D. Ga. 1971), plus an additional reason to be stated. I agree with the Trial Court "that plaintiff was afforded procedural due process in connection with the various hearings before local zoning authorities" and that "there is nothing to indicate that the decision of the Commissioners could be found to be arbitrary." The majority opinion groups these two cases together and over-reacts, I think, to the contention of one of the plaintiffs that as to it the County Commissioners in star chamber fashion used non-record secret evidence. I, naturally, have examined that charge carefully. First, it must be noted that only Rockbridge Associates, Ltd. makes this contention. South Gwinnett Venture's case was considered by the Commissioners on November 24, 1970, and again on December 1, 1970, and there is no contention that any secret evidence was used in the consideration of that case. The Rockbridge case was considered by the Commissioners earlier on August 25, 1970 and September 9, 1970, and it is in connection with these earlier hearings that Rockbridge claims the use of secret evidence. Secondly, I think this charge is unsubstantiated. What happened is this: at the August 25, 1970 hearing one of the Commissioners moved to "table the decision for two weeks so that he could obtain additional studies and consult with the Engineering Department." This does not sound star chamberish. His intentions were announced in open meeting. The postponement was for two weeks. The Engineering Department of Gwinnett County is proba-

bly not so large that plaintiffs could not have ascertained whatever information it furnished the Commissioners had they so desired. Nor does any reason appear why they did not inquire at the resumed hearing on September 9, 1970 as to what additional studies, if any, the Commissioners had obtained. Rockbridge argues that the Commissioners have refused to disclose the contents of their conversation with the Engineering Department and the additional studies. Nothing in the record substantiates this argument. Nor was there any request by plaintiffs for any more complete or detailed findings of fact by the Commissioners. All this suggests that plaintiffs' desire to make a federal case exceeded their fear of deprivation of due process.

An additional reason not specifically assigned by the Trial Court for dismissing the complaint is failure of the plaintiffs to exhaust their administrative remedies. While a litigant normally need not exhaust his state "judicial" remedies, normally he must exhaust his state "legislative" or "administrative" remedies before challenging state action in federal court. *See* Wright, Federal Courts, § 49, p. 187 (2d ed.). Under the applicable zoning ordinance plaintiffs had the right to appeal to the Zoning Board of Appeals from any decision of the Chief Building Inspector, and said Board of Appeals is empowered:

> "1. To hear and decide appeals when it is alleged there is error in any order, requirement, decision or determination made by the Chief Building Inspector in the enforcement of this Zoning Resolution.

"2. To hear and decide requests for the Special Exceptions of the Zoning Resolution upon which the Zoning Board of Appeals is required to pass.

"3. To authorize, upon appeal in specific cases, such variances from the terms of the Zoning Resolution as will not be contrary to the public interest where, owing to special conditions, a literal enforcement of the Zoning Resolution will, in an individual case result in unnecessary hardship, so that the spirit of the Zoning Resolution shall be observed, public safety and welfare secured and substantial justice done. Such variances may be granted in such individual cases of unnecessary hardship upon a finding by the Zoning Board of Appeals that:

"a. There are extraordinary and exceptional conditions pertaining to the particular property in question because of its size, shape or topography, and

"b. the application of the Resolution to this particular piece of property would create an unnecessary hardship, and

"c. such conditions are peculiar to the particular piece of property involved, and

"d. such conditions are not the result of any actions of the property owner, and

"e. relief, if granted, would not cause substantial detriment to the public good nor impair the purposes or intent of this Resolution, and

"f. no variance may be granted for a use of land or building or structure that is prohibited by this Resolution.

"4. In exercising the above powers, the Zoning Board of Appeals may, in conformity with the provisions of this Resolution, reverse or affirm, wholly or partly, or may modify the order, requirements, decisions or determination from which the appeal is taken and, to that end, shall have all the powers of the Chief Building Inspector from whom the appeal is taken and may issue or direct the issuance of a Building or Occupancy permit."

The foregoing itemization of instances in which Zoning Board of Appeals might grant variances f the terms of the Zoning Resolution when read in nection with Article I of the Zoning Resolution sta its objectives:

". . . [F]or the purposes of promoting the health, safety, morals, convenience, order, prosperity or the general welfare of the present and future inhabitants of Gwinnett County; of lessening congestion in the streets; securing safety from fire, panic and other dangers; providing adequate light and air; preventing the overcrowding of land, avoiding both undue con-

centration and urban sprawl; facilitating the adequate provision of transportation, water, sewerage, schools, parks and other public requirements; protecting property against blight and depreciation; encouraging the most appropriate use of land, buildings and other structures throughout the County; securing economy in government expenditures; and for other purposes, all in accordance with a comprehensive plan for the development of Gwinnett County, the County Commissioners of Gwinnett County do hereby ordain and enact into law the following Articles and Sections of the Zoning Resolution of Gwinnett County, Georgia"

fully answers plaintiffs' contention of lack of standards. *See Atlanta Bowling Center, Inc. v. Allen*, 389 F.2d 713 (5th Cir. 1968).

Granted that what is unquestionably a legislative function, the adoption of a general zoning plan or the zoning of an entire area, becomes, next day, to some extent a judicial function, when one of the affected property owners petitions for relief from the zoning restriction, certainly the metamorphosis is not complete. What was all legislative one day remains at least quasi-legislative the next day. *See Higginbotham, Etc. v. Barrett, Et Al.*, ____ F. 2d ____ (5th Cir. 1973) [No. 72-1526, February 14, 1973], and *Donovan v. Clarke*, 222 F. Supp. 632 (D.C. 1963). The requirements of procedural due process are not procrustean. The Supreme Court said in *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 6 L.Ed.2d 1230, 1236 (1961) ". . . consideration of what procedures due process may re-

quire under any given set of circumstances must begi with a determination of the precise nature of the gov ernment function involved as well as of the privat interest that has been affected by governmental ac tion." See also *Goldberg v. Kelly*, 397 U.S. 254, 25 L. Ed 2d 287 (1970). In *Dixon v. Alabama State Board o Education*, 294 F. 2d 150 (5th Cir. 1961), it was hel that in some instances, to-wit: suspension of student from a tax-supported college, procedural due proces does not require "a full-dress judicial hearing, wit the right to cross-examine witnesses." Under the fact of this case it was not an infirmity of Constitutiona proportions for one of the Commissioners to mov for an adjournment of two weeks stating his intentio to obtain additional studies and consult with the Eng neering Department, particularly since no objectio was voiced by petitioners at the public hearing a which that announcement of intention was made, an since no effort was made by plaintiffs to obtain infor mation as to the content of such studies or consultatio until after the filing of this suit.

Public hearings were held. Plaintiffs attended. A least one of them, South Gwinnett Venture, was ac companied and represented by counsel. The othe plaintiff, whether or not accompanied and represente by counsel, fully participated in the public hearing b presenting evidence.

The Trial Court recognized that plaintiffs were e titled to due process and concluded specifically tha they had not been deprived thereof. A hearing was hel in the court below at which plaintiffs clarified thei contentions and the facts in the case. Thus the cou

was not acting solely on pleadings but was fully informed. The complaints were dismissed not for lack of jurisdiction but for failure to present any substantial federal question.

As was said in *Confederacion de la Raza Unida v. City of Morgan Hill*, 324 F. Supp. 895 (N.D. Calif. 1971): "the courts have traditionally recognized that zoning matters are of particular concern to, and the province of, the local communities involved and . . . should interfere with the judgment of the local authorities only in the most extreme cases, and under the most extreme circumstances. This attitude goes back at least as far as *Village of Enclid v. Amber Realty Co.*, 272 U.S. 365 . . . ." And it was said in *Donovan v. Clarke, supra*, at 634: "Such a determination (on the petition of a resident for a change in the zoning of his property) is subject to review by the courts, not on the merits of the issues presented, but as to whether the action was justified or was capricious, arbitrary, unreasonable or discriminatory." And this court said in *Higginbotham, Etc. v. Barrett, et al., supra*, "The law is settled that the zoning of property, *including* the preparation of comprehensive land use plans, involves the exercise of judgment which is legislative in character and is subject to judicial control only if arbitrary and without rational basis." (Emphasis added). The quoted holding indicates that zoning *in general*, and not just the preparation of comprehensive land use plans is a legislative function.

Even in a criminal trial where the requirements of due process are *strictissimi juris* a perfect trial is not demanded, only a fair trial. *Lutwak v. United States*,

344 U.S. 604, 97 L. Ed. 593 (1953); *United States v. Rhoden*, 433 F. 2d 598 (5th Cir. 1972).

The case of *Hot Shoppes, Inc. v. Clouser*, 231 F. Supp. 825 (D.C. 1964), relied upon by appellants is easily distinguishable on two grounds: first, there the Board of Zoning Adjustment violated the detailed regulations governing its own procedure; and, second, the members of the Board conducted an inspection of the premises and failed to set forth the facts which it claimed it discovered as a result of the inspection. The court said "plaintiff did not know that such inspection had taken place, and had no opportunity to question or refute the results of such inspection." That is not the case *sub judice*. Our appellants knew that one Commissioner planned to obtain additional studies and to consult with the Engineering Department prior to the next meeting. It would have been an easy matter for our appellants to have attended the next regular meeting, to have requested that Commissioner to inform them as to exactly what new information, if any, he had obtained through the additional studies and from his consultation with the Engineering Department, and to have requested, if needed or desired, an opportunity to refute the same.

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